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ABSTRACT

The seven articles in this collection deal with theoretical and practical freedom of speech issues. Topics covered are: the United States Supreme Court, motion picture censorship, and the color line; judicial decision making; the established scientific community's suppression of the ideas of Immanuel Velikovsky; the problems of avant-garde jazz, as they relate to freedom of expression and rhetorical art; the Supreme Court and the First Amendment to the Constitution, 1978-79; freedom of the press as an eroding legal concept; and Demosthenes' viable defense of free speech in civil service. A bibliography of materials pertaining to freedom of speech is also included in the collection. (FL)

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The H. A. Wichelns Memorial Award for the most significant contribution to the Free Speech Yearbook was established in 1974 to honor Herbert Wichelns, a pioneer in the speech communication discipline and an early advocate of the importance of the speech-law aspects of speech communication.

1979 Award Recipient: Nickie Fleener, The University of Tulsa

"THE WORST CASE OF RACIAL EQUALITY HE EVER SAW:" THE SUPREME COURT, MOTION PICTURE CENSORSHIP, AND THE COLOR LINE

Nickie Fleener
The University of Tulsa

"The worst case of racial equality he ever saw" was the reason given by Memphis motion picture censor Lloyd Binford when he justified censorship of the film Imitation of Life in 1950.[1] Thus, Binford suppressed the film because of his belief that Imitation of Life contained black characters that the predominately white Memphis audiences would find offensive or demeaning to their race. Although Binford later approved the film with changes, his interpretation of the word offensive to include the presentation of equality of races is not unique in the history of motion picture censorship.

Virtually from the public introduction of the motion picture medium in the United States, "offensive" thematic content has been censored from films. In the earliest instances "offensive" content tended to be defined in moral and sexual terms.[2] However, censors rather quickly expanded their definitions of offensive to include racial, political, and religious themes.[3] The almost total discretion of the censor to determine what was offensive was finally restricted in 1952 when the United States Supreme Court first brought the motion picture medium within the scope of the First Amendment.[4] More specifically, a unanimous Court ruled in Burstyn v. Wilson that the standard of sacrilegious under which the New York censors had banned the film The Miracle was "far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society."[5] Thus, the Court rejected sacrilegious as an acceptable censorship standard as the standard existed in the New York statute but left in question the constitutionality of a number of other film censorship standards including censorship based on the treatment of a racial or ethnic group.

No one aware of today's censorship climate can fail to see that the freedom of speech issue raised by censorship of the treatment of racial or ethnic groups remains a serious question. For example, as recently as January 1979, a censorship controversy raged in Bloomington, Indiana, over a scheduled screening of D.W. Griffith's classic film, The Birth of a Nation.[6] The controversy began after the American Guild of Organists announced that it would sponsor a mid-February showing of The Birth of a Nation on the Indiana University campus. Several individuals argued that the film should not be shown because the film represented a classic example of the perpetuation of negative racial stereotypes and because the showing was scheduled during Black History Month.[7] After receiving the protests, the Guild cancelled its sponsorship of the film and stated that it did so because the film "presents sensitive material in a prejudicial manner which might not be appreciated by some viewers."[8] The Guild's action prompted other individuals to argue not only for the right of the film to be shown but also for their rights to see the film.[9] The Guild renewed its sponsorship of The Birth of a Nation after determining that the "film had historic, artistic, and educational merit."[10] While protesters peacefully marched and distributed literature concerning a concurrent showing of The Birth elsewhere on campus sponsored by the Black Student unions "in proper context," The Birth was shown in the I.U. Auditorium, March 19, 1979.[11]

A similar controversy surrounds the more contemporary film, Deer Hunter. Critically acclaimed and selected by the Motion Picture Academy as best picture of 1978, Deer Hunter has also been condemned as "a racist attack on the Vietnamese people" and a misinterpretation of history.[12] Among the complaints against the film are that it negatively stereotypes all Vietnamese as inscrutably evil and that the central metaphor of the film which shows the absurdity of the war is a lie.[13] Specific protests against the film have taken

the forms of pamphleteering and demonstrations. Although the film has not been suppressed, at least one writer has expressed the belief that if the Academy Award ballots had been distributed only one week later, the film would have not been selected as 1978's best film.[14]

Perhaps an even more serious indication of the importance of this issue can be found in Congressional attempts to regulate film content dealing with racial or ethnic groups. For example, a resolution that asked the film and broadcast industries to remove voluntarily negative stereotypes of ethnic, racial, and religious groups from all films and programs was introduced into the U.S. Congress in 1971.[15] Co-sponsored by over 69 members of the House of Representatives, the resolution contained a provision for federally enforced censorship if the voluntary effort failed.[16] Hearings were held concerning the resolution, but it was not voted on by the House.[17]

Although the preceding examples illustrate attempts at censorship designed to suppress stereotypes the groups involved considered negative, Binford's censorship of Imitation of Life is a reminder that sensitivity as a basis for censorship is an issue with two separate yet related faces. Binford's censorship indicates that statutes written to permit censorship based soley on the thematic treatment of race may also be used to support prevailing social norms such as segregation.

Censorship based on treatment of race is not peculiar to the motion picture medium.[18] However, because the scope of First Amendment coverage determined by the Supreme Court has varied from medium to medium, it is appropriate to discuss the issue as it relates to one medium. The purpose of this research is to study the constitutional issue of whether films can be censored for racial portrayals. More specifically, the research has been guided by this question. Has the U.S. Supreme Court squarely faced the question: Is motion picture censorship soley for treatment of racial themes constitutional?[19] To answer this question, the research specifically considers only those Court cases involving films censored for racial portrayals. However, a general background concerning film censorship for racial reasons precedes the discussion of the cases. Additional background material of film censorship cases decided by the Court for reasons other than racial stereotyping is presented in Appendix A.

An Overview of Film Censorship for Racial Reasons Prior to Supreme Court Involvement With The Issue.

Although the argument that films should be censored because of content judged racist is not new, the standard was not applied to films on a wide scale until the 1940's.[20] During the 1940's, censors (primarily in the South) began frequently cutting scenes featuring black actors and actresses from films. For example, Variety reported in 1944 that "some local censors are attacking scenes indiscriminately leaving the continuity blurred and the entire film choppy and confused."[21] In particular, the Memphis censors led by Lloyd Binford were characterized as considering all films which even hinted at equality between the races "inimical to the public welfare, health, morals, and safety" of that city.[22] For example, the Memphis censors banned the Jack Benny film Brewster's Millions because Rochester's antics were deemed "too familiar," eliminated Lena Horne from any movie in which she appeared because "white people don't want to see her," and rejected Lost Boundries because it dealt with "social equality between whites and negroes in a way that we do not have in the south."[23] During World War II, newsreel sequences showing black troop actions were cut "in several southern towns."[24] Variety summarized the situation:

> The crux of the problem is that although white southern audiences enjoy negro sequences in films for their entertainment value, they will not countenance any scenes showing the negro on a basis of social equality with the whites. Local censors will eliminate such scenes regardless of the effect on the artistic side or the continuity of the film.[25]

This situation came to the attention of Thurgood Marshall, then special counsel to the National Association for the Advancement of Colored People, who called racial censorship "one of the worst evils that can be imagined" and who petitioned the American Civil Liberties Union to combat it.[26] Marshall was disturbed particularly by a Memphis ban of the film Dixie. The ACLU responded to Marshall's request for help by saying "certainly we will take up the matter of those southern censorships, although it is going to be a tough job."[27]

The ACLU pursued the matter with little immediate success. In early 1945, Memphis banned Brewster's Millions. The ACLU attempted to interest the film's distributor and/or the film's exhibitor into taking legal action against the censors. However, the exhibitor, Harry Kosner of Edward Small Productions, replied that his company would not "dare fight for fear the other southern theatres and circuits will ban the picture."[28] Likewise, the distributor, Unites Artists, said it "had no definite views one way or another" and would be guided by the exhibitor.[29]

Later in 1945, H.L. Mitchell, president of the Southern Tenant Farmers Union, notified the ACLU that censorship was becoming a major issue in Memphis because "Mr. Benford [sic] has banned a large number of pictures in the past few weeks and both newspapers have carried editorials denouncing the censorship.[30] The ACLU responded that it had tried to bring a test case but that "local exhibitors and distributors . . . are all so afraid of retaliatory action" that none would initiate a lawsuit. Again, the ACLU turned to United Artists and asked that company to initiate a suit:

> As you probably know, the ACLU has been following closely the censorship activities of the Memphis Board of Censors. Earlier in the year when Lloyd T. Binford. . . made the headlines by barring Brewster's Millions we attempted to get a test case. Unfortunately, . . . exhibitors are rather loath to defend themselves because of the pressure that can be brought upon them by the municipal authorities. It is therefore gratifying to us to note that United Artists is prepared to combat further censorship. May we offer you our assistance in any case that you might bring? We are prepared to help carry any suit to the United States Supereme Court if necessary.[31]

However, it was two more years before United Artists took the Memphis Board of Censors to Court.

Film Censorship Cases Involving Censorship for Racial Treatment Which Reached The U.S. Supreme Court

During the summer 1947, United Artists distributed a motion picture comedy, Curley, produced by Hal Roach. The film presented a variation upon the structure and theme of the "Our Gang" comedies for which Roach was well known.[32] The film had already been approved in its entirety by censorship boards in New York, Kansas, Ohio, Maryland, Pennsylvania, Virginia, Chicago, and Boston[33] when it was submitted to the Memphis Board of Censors.[34] The Memphis censors rejected the film. In a letter explaining the board's action to United Artists, board chairman Lloyd Binford wrote:

> I am sorry to inform you that it is unable to approve your "Curley" picture with the little Negroes as the south does not permit Negroes in white schools nor recognize social equality between the races even in children.

United Artists (UA) interpreted this to mean that the film had been banned in Memphis and decided to protest. Gradwell Sears, UA president, said, "We are not going to take this lying down. I have instructed our lawyers to test the

constitutionality of Binford's censorship."[36]

United Artists and Hal Roach filed a joint petition in the Circuit Court of Shelby County, Tennessee, seeking review of the film without legal authority; that the film censorship ordinance in question was unconstitutional; that the board banned the film soley because negroes appeared in it; and that the board had acted in a "capricious and arbitrary" manner and thus violated the due process guarantees of the Tennessee and U.S. Constitutions.[38] The petition was dismissed by Circuit Court Judge Floyd Henderson, Jr.[39] United Artists and Hal Roach appealed to the Tennessee Supreme Court.[40] The Tennessee Supreme Court heard the case and affirmed Henderson's position. The Tennessee court held that "petitioners were doing business in Tennessee and having failed to comply with statutory provisions for qualification of a foreign corporation to do business in the state could not maintain in the proceeding."[41] In dicta, the court stated that motion picture censorship might not be based soley on race or color, but that the constitutionality of the Memphis ordinance could be contested only by someone with standing in the state.[42]

United Artists planned an appeal to the U.S. Supreme Court.[43] The Motion Picture Producers and Distributors Association (MPPDA) supported this action, viewing the case as an excellent opportunity to seek a reversal of the 1915 Mutual Film Corporation v. Industrial Commission of Ohio[44] and to have the Court forbid film censorship on racial grounds. MPPDA executive secretary Sidney Schreiber wrote to Memphis attorney Hamilton Little:

> There is no reason to assume that the motion picture should forever remain outside the full protections of the First Amendment. We expect that the Supreme Court will overrule this anachronism when the question is re-presented to it. We expect that the case of United Artists v. Memphis will furnish the occasion for the disapproval of the principle enunciated in the Mutual Film Corp. case.[45]

Marie Wathen, Film Daily's Memphis correspondent, wrote editor Chester Bahn that she was sure "no picture could be banned because of Negro and White children playing together--not in the U.S. Supreme Court."[46] Similarly, the Louisville Courier-Journal editorialized that the outcome of the case was "foregone" because "as long as the Constitution guarantees equality of man, it must imply the equality of the pictures of children."[47]

In October 1949, United Artists and Hal Roach filed their petition for a writ of certiorari with the U.S. Supreme Court. The petitioners claimed "the basic issue presented is the constitutionality of previous restraint or censorship of talking motion pictures."[48] Major questions in the petition included:

1) Are state laws which provide for previous restraint or censorship of talking pictures in derogation of freedoms secured by the First Amendment and protected against State abridgment by the "due process" and "equal protection" clauses of the Fourteenth Amendment?

2) Even though previous restraint or censorship is not unconstitutional per se, may race or color, or the fact that Negro children appear along with white children in school room scenes, constitute a valid ground on which a talking picture may be censored and its exhibition banned?

3) Can state courts evade primary federal constitutional issues by interposing non-federal grounds of decision which, in substance and effect, deny fundamental constitutional rights?[49]

In addition, United Artists asked whether a film's producer and distributor have standing to sue.[50]

On May 8, 1950, the Court denied certiorari without dissent.[51] The case seems to have been dismissed because of procedural issues stressed by the Tennessee Supreme Court rather than on constitutional grounds. United Artists and the film industry turned their attentions to another film censored because of a racial theme, Lost Boundries.

In early 1950, Lost Boundries was submitted to Christine Smith, Atlanta, Georgia's film censor, for approval.[52] Smith ruled the film could not be shown in Atlanta because the picture would "adversely affect the peace, morals and good order of said city."[53]

RD-DR Corporation, producer, and Film Classics, distributor of Lost Boundries, sued Smith in the U.S. District Court to enjoin enforcement of Atlanta's film censorship ordinance.[54] However, the three-judge federal court upheld the censor's ban and declared the ordinance constitutional.[55] Thus, unlike the Tennessee Supreme Court disposition of the United Artists case on procedural grounds, the Atlanta federal court directly tackled the constitutional issue.

Speaking for the federal court, Chief Judge Neil Andrews said the basic question was "whether motion pictures are entitled to the protection constitutionally accorded the press."[56] Citing the Mutual decision, Andrews stated that motion pictures could not be considered part of the press. In spite of Supreme Court Justice William O. Douglas's dicta in U.S. v. Paramount Pictures,[57] in which Douglas said "we have no doubt that motion pictures, like newspaper and radio, are included in the press whose freedom is guaranteed by the First Amendment," Andrews said he could not "anticipate that the Court will overrule the Mutual Film case."[58] Expressing his personal opinion however, Andrews wrote that he believed the ordinance in question should be interred,

> . . .in the attic which contains the ghosts of those, who arrayed in the robe of Bigotry, armed with the spear of Intolerance and mounted on the steed of Hatred have through all ages sought to patrol the highways of the mind. In essense that part of the ordinance presently under scrutiny empowers the Censor to determine what is good and what is bad for the community and that without any standard other than the Censor's personal opinion. As here applied it attempts a degree of thought control, but unless motion pictures can be afforded the coverage extended the press, it is clear that the police power of the State has not been exceeded.[59]

RD-DR Corporation appealed to the Fifth U.S. Circuit Court of Appeals. Not only did that court affirm, but also it indicated its conviction that there was no need for a review of the Mutual decision.[60]

RD-DR Corporation petitioned the U.S. Supreme Court for a writ of certiorari.[61] Though Justice Douglas stated the petition should be granted, the Court refused.[62] So when the U.S. Supreme Court was asked to face squarely the constitutional question of press freedom for motion pictures, it refused.

A few days after the Court denied certiorari in the RD-DR Corporation case, the motion picture industry turned its support to another film censored for racial content, Pinky. William Gelling had been convicted in the County Court of Harrison County, Texas, for exhibiting Pinky without a permit.[63] Gelling had submitted the film to the Marshall, Texas, Board of Censors which denied a film permit. The board held that the film "was of such character as to be prejudicial to the best interests of the people of the city."[64] Gelling exhibited the film without a permit and was arrested.[65]

Gelling appealed his conviction to the Texas Court of Criminal Appeals. He contended the ordinance under which he was arrested was invalid on its face, violating the First and Fourteenth Amendments.[66] The Appeals Court disagreed. In its opinion, the unanimous court drew heavily from Judge Hutchenson's opinion in RD-DR Corp. v. Smith.[67] In part, Judge J. Beauchamp, speaking for the court, stated:

> We cannot concede that the motion picture industry has emerged from the business of amusement and become propagators of ideas entitling it to freedom of speech. . . .The desire of a great industry to reap greater fruits from its operations should not be indulged at the expense of Christian character upon which America must rely for its future existence. Every boy and every girl reaching manhood or womanhood is to an extent the product of that community, and if the communities are divested of all power to surround them with wholesome entertainment and character building education then the product will go forth weak indeed.[68]

The court also said that "the name and character of the picture exhibited are immaterial."[69]

Gelling then appealed to the U.S. Supreme Court. The case was adjudicated just one week after the Court Burstyn ruling. In a one sentence per curiam decision the court reversed Gelling's conviction on the authority of Burstyn and Winters v. New York.[70]

Justices Felix Frankfurter and William Douglas filed concurring opinions in the case. Frankfurter contended that the censorship ordinance "offends the Due Process Clause of the Fourteenth Amendment on the score of indefiniteness."[71] Douglas said the First Amendment had been violated:

> The evil of prior restraint, condemned by Near v. Minnesota in the case of newspapers and by Burstyn in the case of motion pictures is present here in flagrant form. If a board of censors can tell the American people what it is in their best interests to see or read or to hear, then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated.[72]

Thus, two members of the Court seemed to dispatch as unconstitutional the licensing criterion of "prejudicial to the best interests of the people" without considering the specific film involved or the fact that the film had been found potentially prejudicial because of is treatment of a racial theme.

In 1954, the Ohio Supreme Court upheld the censorship of two different films, M and Native Son.[73] Although three separate cases were actually involved, the court considered the three together because it concluded "the same or similar questions are involved."[74] Nevertheless, the fact situations varied significantly.

The motion picture M was banned by the Ohio Department of Education "on account of being harmful."[75] The film's American producer, Superior Films, appealed the ban on the grounds that the film "artistically and dramatically" treated at least five important social problems and was not harmful.[76] Further, Superior Films claimed that the Ohio film censorship statutes violated the First and Fourteenth Amendments of the U.S. Constitution and the First Article of the Ohio Constitution because of indefinite and vague censorship criteria.[77]

The two other cases involved censorship of the film Native Son.[78] One was an action in mandamus by Classic Picture, Inc., to require the Department of Education to reexamine the film. Prior to this action, the Department of

Education denied another review of the film because the film had been considered by the Department on three previous occasions. Despite cuts and deletions, the Department pronounced the film:

> . . .Harmful; because--contributes to racial misunderstanding presenting situations undesirable to the mutual interests of both races; against public interest in undermining conditions at a time when all groups should be united against everything that is subversive.[79]

The other case asked that these censorship orders be set aside and the Ohio film censorship statutes declared unconstitutional.[81] Relying upon the U.S. Supreme Court decisions in Burstyn and Gelling, the Court stated:

> From these expressions of the U.S. Supreme Court and otherwise, we conclude that, although a motion picture film may not be rejected because of 'sacreligious' expressions or portrayals, there still remains a limited field in which decency and morals may be protected from the impact of an offending motion picture film by prior restraint under proper criteria. There can be no inherent right to publicity which tends to destroy the very social fabric of the community and consequently in such instances there is no right of free speech or free press to be infringed. As we view it, the United States Supreme Court has not ipso facto taken away all community control of moving pictures by censorship, and this court will not do so under the claim of complete unconstitutionality of censorship laws.[82]

Further, the Ohio court ordered the Department of Education to reconsider Native Son.[83]

The three cases were joined in an appeal to the U.S. Supreme Court.[84] The Court decided the cases with Commercial Pictures Corp. v. Regents of the University of the State of New York.[85] In a one sentence per curiam decision, the judgments were reversed on the authority of Burstyn.[86] Justice Douglas filed a concurring opinion, with which Justice Black agreed, expressing the broader view that the First Amendment guarantees of freedom of expression prevented a state from establishing censorship over motion pictures. In part Douglas stated ". . .in this nation every writer, actor, or producer no matter what medium of expression he may use should be freed from the censor."[87]

Thus, the Court seems to have considered overbroad the Ohio standard that only films "of a moral, educational, amusing, or harmless character" could be approved and the New York standard forbidding films judged "immoral or tended to corrupt morals."[88] Whether the Court considered the censorship criteria utilized in the Native Son cases when deciding the Superior Film case is unclear.

Therefore, the U.S. Supreme Court had been asked at least four times to consider cases involving films censored because of racial themes. In at least one of these cases, the Court was asked specifically the question of whether race or color might constitute a valid grounds on which the exhibition of a motion picture might be forbidden. However, in each case, the Court decided the questions involved on broader grounds than the constitutionality of racial sensitivity as a grounds for censorship. Thus, it can be seen that the U.S. Supreme Court has never specifically resolved the constitutionality of treatment of racial themes. It is also interesting to note that in all four cases that reached the Supreme Court, the censorship of the film involved was based on the film's portrayal of black characters judged a threat to existing social norms such as segregation rather than on censorship stemming from the suppression of images blacks argued were demeaning to their race.

Discussion

Some scholars have argued that by reversing lower court decisions in Gelling and Superior Films, the Court in effect has stated that censorship based solely on the treatment of race is unconstitutional.[89] To support further this position, the validity of the Court's ruling in Beauharnais v. Illinois is brought into question.[90] In support of the questionable status of Beauharnais, Judge J. Skelly Wright's statement concerning the case in his concurring opinion in Anti-Defamation League of B'nai B'rith v. FCC is quoted. Of Beauharnais Wright commented in part "Far from spawning progeny, Beauharnais has been left more and more barren by subsequent First Amendment decisions, to the point where it is now doubtful that the decision still represents the views of the Court."[91] On the other hand, it could be argued that because the Court in Miller v. California returned to a community rather than a national standard concerning the defining of obscenity, the Court could apply similar reasoning in cases involving censorship for the treatment of race. Thus, the definition of offensive characterizations could be established by community standards. In the extreme, such an interpretation could not only allow one community to ban films like The Birth of a Nation and Deer Hunter, but also could allow another community to suppress filmic interpretations of the Holocaust because of the allegedly negative images of Germans. Thus, however offensive, allowing suppression of what a racial group considers negative images of itself allows the bigot to suppress films that place racial groups in an equal or positive light.

In addition, many instances of contemporary film censorship based on stereotypes do not reach the courts. For example, as discussed earlier, the February 1979 The Birth of a Nation censorship controversy was resolved without court intervention. However, the resolution was not reached without a fight. During the battle several rights to free speech were brought into question including the right of the film to be screened, the right of those who wished to see the film to do so, and the right of those who opposed the film to voice peacefully that opposition by picketing and pamphleteering. Because The Birth was eventually shown to an audience wishing to see it, and because the protesters were allowed peacefully to demonstrate their opposition to the film, in this instance all three rights were affirmed. However, the resolution easily could have been otherwise.

Thus, although doubts may exist concerning whether the Court today would recognize censorship based on offensive stereotypes as consistent with the First Amendment, the Court itself has not answered the question. Therefore, the issue remains a viable one and actual or threatened censorship of films for racial themes continues to take place.

FOOTNOTES

[1]Lloyd Binford quoted by Theodore Kupferman and Philip O'Brien, "Motion Picture Censorship: The Memphis Blues," Cornell Law Quarterly 36 (Winter 1951): 278 n.4. See also Motion Picture Daily, 20 January 1950, p. 1, and Variety, 8 February 1950, p. 19. As presented to the Memphis censors in 1950, Imitation of Life was a revival of a 1934 film. Starring Fredi Washington and Louise Beavers, Imitation of Life concerned a young woman's decision to "pass" across the color line from black to white. For a more detailed description of the film see Thomas Cripps, Slow Fade to Black (New York: Oxford Press, 1977), pp. 299-302.

[2]The first recorded protest against a movie occurred just two weeks after Edison's first peep show parlor opened in New York. Based on moral grounds, this protest was against a film called Dorilta in the Passion Dance. Three years later a court ordered censorship of the film Orange Blossoms which featured a pantomime of a young bride preparing for her wedding night. The presiding judge in the case denounced the film as "offensive to public decency." See Richard Randall, Censorship of the Movies (Madison: University of Wisconsin Press, 1968), p.11, and Robert Stanley, The Celluloid Empire (New York Hastings House, 1978), p.174.

[3]See Kupferman and O'Brien, p.273

[4]Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952). The Burstyn ruling revised an earlier Court decision in Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230, 35 S. Ct. 387, 59 L.Ed. 552 (1915) which had excluded film from First Amendment protection.

[5]Burstyn V. Wilson, 504-505

[6]Called by at least one film scholar "the most influential and controversial film in the entire history of motion pictures" The Birth of a Nation tells the story of the Civil War, Reconstruction, and the birth of the Ku Klux Klan from the perspective of two families. (See Harry Geduld, ed., Focus on D.W. Griffith (Englewood Cliffs, New Jersey: Prentice-Hall), p. 8) The film was controversial because of the range and strength of the black stereotypes presented. (For a full description of the black stereotypes in the film see Donald Bogle, Toms, Coons, Mullatoes, Mammies, and Bucks (New York: Bantam Books, 1973), pp. 1-22) Some individuals trace the passage of censorship ordinances which established treatment of race as a standard to reaction to The Birth. (For example, see Kupferman and O'Brien, p. 273n.6.)

[7]Gene Monteith, "Birth of a Nation' May Be Rescheduled," ids 2 February 1979, p.8.

[8]Gene Monteith, "Guild Reschedules "Birth of a Nation," ids 28 February 1979, p.2

[9]For example, see Greg Weber, "Censor of Racist Film Not Warranted Move," ids, 29 January 1979, p.4; Judy Wolf, "Guild's Gag Mocks Higher Education," ids, 5 February 1979; and, Thomas Bullard, "Movie Offered Historical View," ids, 8 February 1979, p. 4.

[10]Monteith, "Guild Reschedules 'Birth of a Nation."

[11]Gene Monteith, "'Birth' Draws Protesters to Auditorium," ids 20 March 1979, p. 1. Thus, rather than being suppressed the film actually was shown on campus twice: concurrently in the Auditorium and in Woodburn Hall. The Auditorium showing was sponsored by the Guild and the film was accompanied by organ music. The Woodburn Hall showing was sponsored by the Black Student unions and was not accompanied by music.

[12]Aljean Harmetz, "Oscar-Winning 'Deer Hunter' Is Under Attack as 'Racist' Film," New York Times, 26 April 1979, Sec. C, p. 15.

[13]Ibid. The metaphor is a game of Russian Roulette presented in the film as a form of torture used by the Vietcong against the American prisoners. The film's distributor, Universal Pictures, admits that the specific incident presented did not take place but also argues that almost all film is based on artistic metaphors.

[14]Ibid.

[15]U.S. Congress, House, Committee on Interstate and Foreign Commerce, Subcommittee on Communication and Power, Hearings Before the Committee on Interstate and Foreign Commerce, Subcommittee on Communication and Power, 92nd Congress, 1st Session on H. Con. Resolution 9 and H. Con. Resolution 182, Expressing the Sense of Congress Relating to Films or Broadcasts Which Defame, Stereotype, Ridicule, Demean, or Degrade Ethnic, Racial, and Religious Groups (and all identical resolutions) April 27 and 28, 1971, 92nd Congress, 1st Session, 1971 (Washington: Government Printing Office, 1971).

[16]Ibid.

[17]Ibid.

[18]For example see, Anne Lyon Haight and Chandler B. Grannis, Banned Books 387 B.C. to 1978 A.D. (New York: RR. Bowker, 1978), especially pp. 120-122. Of particular importance to the context of this paper are two U.S. Supreme Court decisions concerning censorship of media other than film for racial reasons. One of these cases is Anti-Defamation League of B'nai B'rith, Pacific Southwest Regional Office v. FCC, 89 S. Ct. 1190, 394 U.S. 930 (1969). In this case the Court denied certiorari and thus let stand the lower court decision. The case involved the League's contention that the FCC should have denied a license renewal to television station KTYM, Inglewood, Calif., because the station aired commentary offensive to persons of the Jewish faith. The League had previously protested the commentary in paid time programs by Richard Cotten to the station. In response to the League protest, the station offered the League free and equal time either to respond to Cotten's comments or time to use as the League saw fit. The League refused KTYM's offer of free time. The FCC renews the station's license without an evidentiary hearing on the content of Cotten's programs. The League argued that the FCC's action was inappropriate because "Cotten's utterances were so contrary to the public interest that a Licensee should be disqualified for renewal." (See Anti-Defamation League v. FCC, 403 F. 2d 169, 170). The courts rejected the League's reasoning. For the Federal Circuit Court, then Circuit Judge Warren Burger wrote that "for the FCC to promulgate rules regarding permissible and impermissible speech relating to religion would be not only an egregious interference with free speech in broadcasting, but also an unconstitutional infraction of the free exercise clause and the establishment clause of the First Amendment." (See Anti-Defamation League v. FCC, 403 F.2d 169 (1968). The second case of importance to this paper is Beauharnais v. Illinois 343 U.S. 250, 72 S. Ct. 725, 96 L.Ed. 919 (1952). In this case the Court upheld a state conviction for distribution of leaflets which in the words of the statute, portrayed "depravity, criminality, unchastity or lack of virtue of a class of citizens, of any race, color, creed, or religion" and which exposed said persons to "contempt, derision, or obloquy" (See 343 U.S. 250, 252). Thus, in essence in Beauharnais, the Court upheld a group libel law.

[19]Within the context of this research, the terms censor and censorship mean any attempt to examine, review, expurgate, or change all or part of a motion picture. See Webster's New Twentieth Century Dictionary of the English Language, Unabridged, 2nd Edition (Cleveland: World Publishing Company, 1973), p. 292. Although similar arguments could be drawn concerning censorship for ethnic and sexual group defamation, the cases which have reached the Supreme Court dealing with film all consider censorship for racial themes and therefore the research limits itself to that topic.

[20]The primary film consistently engaged in censorship battles prior to the 1940's was The Birth of a Nation. See Kupferman and O'Brien, p. 273.

[21]"More Negro Scenes Cut Out in Dixie Set New Problem for Pix Producers," Variety, 16 July 1944, n.p., clipping in American Civil Liberties Union (ACLU) Archives, Vol. 2548, Wisconsin State Historical Society Microfilm Room, Madison, Wisconsin. Hereafter referred to as ACLU Archives.

[22]Ibid. The statute powering the censors action was Memphis, Municipal Code (1925) Sections 1131 to 1139. The code vested the local censors with "power to censor, supervise and regulate all exhibitions, plays, motion pictures, performances, pantomimes, or other presentations" and provided that the censors "have power to prohibit any exhibition which shall be of immoral, lewd, or lascivious character or which denounces, derides, or seeks to overthrow the present form of national government."

[23]See Lester Velie, "Censorship in Action," Colliers, 6 May 1950, p. 11; "Censor Board Draw Blast of Newsmen," Memphis Press Scimitar, 29 October 1947; Kupferman and O'Brien, p.273; and Ira Carmen, Movies, Censorship, and the Law (Ann Arbor: University of Michigan Press, 1966), pp. 206-210.

[24]"More Negro Scenes Cut."

[25]Ibid.

[26]Thurgood Marshall to Roger Baldwin, 19 July 1944, ACLU Archives, Vol. 2548.

[27]Roger Baldwin to Thurgood Marshall, 20 July 1944, ACLU Archives, Vol. 2548.

[28]Wolff, Greenbaum, and Ernst law firm representative initials lbm to Roger Baldwin, 10 April 1945, ACLU Archives, Vol. 2637.

[29]Transcript of telephone conversation between initials lbm and Harry Kosner, 10 April 1945, ACLU Archives, Vol. 2637.

[30]H. L. Mitchell to Roger Baldwin, 4 August 1945, ACLU Archives, Vol. 2637.

[31]Clifford Forster to H. L. Mitchell, 7 August 1945, ACLU Archives, Vol. 2637.

[32]Clifford Forster to Gradwell Sears, 23 August 1945, ACLU Archives, Vol. 2637.

[33]The film "relates a simple story of how a young and pretty girl is about to assume a new job as a school teacher, how the pupils expect her to be stern and are apprehensive of the new relationship, but how she generally wins the affection of the children through her athletic prowess. Among the children in the cast is a little Negro whose part in the comedy is similar to that of the little Negro "Farina" in the former Our Gang comedies . . .in short the picture is perfectly innocuous." See Petition for Writ of Certiorari to the Supreme Court of the State of Tennessee: United Artists and Hal Roach, Petitioners v. Board of Censors, of the City of Memphis and the Shelby County Board of Censors, Supreme Court of the United States, October Term 1949, No. 680, p. 3.

[34]Kupferman and O'Brien, p. 275

[35]Ibid.

[36]United Artists v. Board of Censors of City of Memphis, 225 S.W. 2d 500, 551 (1948).

[37]"Memphis Censorship Evokes Court Fight by Film Industry," Memphis Commercial Appeal, 20 September 1947, p. 1.

[38]Harry Martin, "Movie Industry Launch Suit Against Binford Censor Board: Bejach Issues Writ Calling Memphis Judges Into Court," Memphis Commercial Appeal, 8 October 1947, p. 1.

[39]225 S.W. 2d 550, 552 (1948).

[40]Ibid., at 550

[41]Ibid.

[42]Ibid.

[43]Ibid.

[44]236 U.S. 230

[45]Sidney Schreiber to (?) Hamilton, 17 April 1948, O'Brien Legal File, Box 40, Folder 14, Manuscript Room, Wisconsin State Historical Society, Madison, Wisconsin (Hereafter referred to as the O'Brien Legal File).

[46]Ibid.

[47]"Marie Walthen to Chester Bahn, 9 March 1949, O'Brien Legal File, Box 40, Folder 14.

[48]"Memphis Censorship Needs to be Checked," Louisville Courier-Journal, 25 September 1947, n.p., clipping in O'Brien Legal File, Box 40 Folder 13.

[49]Petition for Writ, p. 2

[50]Ibid., pp. 14-15.

[51]United Artists Corp. v. Board of Censors of the City of Memphis, 70 S. Ct. 839, 94 L. Ed. 1365, 339 U.S. 952 (1950).

[52]The film Lost Boundries based on a book by William L. White told the story of a black doctor and his family who passed for white in a New Hampshire community. See Samuel Bloom, "A Social Psychology Study of Motion Picture Audience Behavior: A Case Study of the Negro Image in Mass Communication," (unpublished Ph.D. dissertation University of Wisconsin, 1956), p. 14. Atlanta Ordinance Governing the Exhibition of Motion Pictures (1944), S. Ct. 1-12. The ordinance stated that all pictures to be exhibited in the city must first be approved by the city's duly authorized censor.

[53]"Atlanta Ban on 'Lost Boundries' Goes Before Federal Court Tomorrow," New York Times, 5 February 1950, Section II, p. 5.

[54]RD-DR Corp. v. Smith, 89 Fed. Supp. 596 (1950).

[55]Ibid.

[56]Ibid., at 597

[57]U.S. v. Paramount Pictures, 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948). This case involved anti-trust action by the government against Paramount and other vertically integrated motion picture companies. It forced film producers to divest themselves of motion picture exhibition theatres.

[58]89 Fed. Supp. 596, 598 (1950).

[59]Ibid., at 598

[60]RD-DR Corp. v. Smith, 183 F. 2d 526 (1950).

[61]RD-DR Corp. v. Smith, 340 U.S. 853, 71 S. Ct. 839, 95 L.Ed. 625 (1950).

[62]Ibid.

[63]Celling v. State (Texas), 156 Tex. Crim 516, 247 S.W. 2d 95 (1952). Pinky was produced by Stanley Kramer and distributed by Twentieth Century Fox. The film told the story of a Negro woman who returned to the South after passing for white in Boston. The story line revolved around the problems the woman had adjusting to the inferior status accorded to blacks in the South. See Edward Mapp, Blacks in American Films Today and Yesterday. (Metuchen, New Jersey: Scarecrow Press, 1972), p. 38.

[64]Carmen, p. 54

[65]Celling v. State, 247 S.W. 2d 95 (1952).

[66]Ibid.

[67]RD-DR Corp. v. Smith, 183 F.2d 562 (1950)

[68]247 S.W. 2d 95, 97 (1952).

[69]Ibid., at 95.

[70]343 U.S. 960. In Winters v. New York, 333 U.S. 507, 68 S. Ct. 665, 92 L.Ed. 840, the Court struck down as unconstitutionally vague a New York statute prohibiting the dissemination of printed matter devoted to the publication of criminal stories or stories of deeds of bloodshed, lust, or crime. In part the court stated: "The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." See 333 U.S. 507, 510.

[71]Ibid.

[72]Ibid.

[73]Superior Films v. Department of Education of Ohio, 159 Ohio St. 315, 112 N.E. 2d 311 (1953).

[74]Ibid. The same or similar issue referred to by the Court was the constitutionality of the Ohio film censorship statute. Ohio Code (1943), Sect. 154-47-154-471, vested in the division of film censorship the power to allow "only such films as are in the judgment and discretion of the board of censors of a moral, educational, or amusing, and harmless character" to be shown in the state.

[75]Ibid., at 316. Case No. 33265. M was a German film based on a series of child murders which spread terror among the inhabitants of Dusseldorf in 1929. See "The Dusseldorf Murders," New York Times Film Reviews: A One Volume Selection (New York: Quadrangle Books, 1971), p. 133.

[76]Ibid.

[77]Ibid.

[78]Ibid., at 317. Cases No. 33282 and 33283. Native Son was described to the Court by Film Classics as follows: the action of the story takes place in Chicago, and part of the picture was filmed there. The role of the central character, Bigger Thomas, an embittered young Negro is acted by Richard Wright, the author of the book. Bigger accidentally kills a white girl. After disposing of her body he attempts to extort money from her parents. After the murder is discovered, Bigger goes into hiding with his sweetheart Bessie Mears, and immediately before his capture murders Bessie in the mistaken belief that she betrayed

him.

[79]Ibid.

[80]Ibid.

[81]Ibid., at 319-335.

[82]Ibid., at 327-328.

[83]Ibid., at 335.

[84]Superior Films, v. Department of Education of Ohio, 346 U.S. 587, 74 S. Ct. 286, 98 L.Ed. 329 (1954).

[85]Commercial Pictures Corp. v. Regents of the University of the State of New York, 305 N.Y. 366, 113, N.E. 2d 502 (1953).

[86]This case involved the censorship of the movie La Ronda by the New York film censors on the grounds that the film was "immoral and would tend to corrupt morals."

[87]346 U.S. 587.

[88]Ibid.

[89]For example see, Murray Schumach, The Face On The Cutting Room Floor (New York: William Morrow and Co, 1964), p. 157, and Hope Eastman, representing the ACLU in testimony during Hearings on H. Con. Res. 9 and H. Con. Res. 182, pp. 37-45.

[90]343 U.S. 250

[91]403 F. 2d 169, 174n.5.

Appendix A

The following represent a selected list of cases consulted to provide background material for this research. However, these cases are not cited in the body of the paper.

Alexander v. Virginia, 413 U.S. 836, 37 L.Ed.2d 993,93 S. Ct. 2803 (1973).
Bainbridge v. Minneapolis, 131 Minn. 195, 154 N.W. 964 (1915).
Billy Jenkins v. Georgia, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974).
Block v. Chicago, 239 Ill. 251, 87 N.E. 1011 (1909).
Freedman v. Maryland, 380 U.S. 51, 13 L.Ed. 2d 649, 85 S. Ct. 734 (1965).
Ginsberg v. New York, 390 U.S. 629, 20 L.Ed.2d. 195, 88 S. Ct. 1274 (1968).
Ginzburg v. U.S., 383 U.S. 463, 16 L.Ed.2d 31, 86 S. Ct. 942 (1966).
Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745, 93 S. Ct. 3689.
Interstate Circuit v. City of Dallas, 390 U.S. 676, 88 S. Ct. 1298, 20 L.Ed. 2d 225 (1968).
Jacobellis v. State of Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L.Ed.2d. 793 (1964).
Kaplan v. California, 413 U.S. 115, 93 S. Ct. 2680, 37 L.Ed.2d. 492 (1973).
Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 79 S. Ct. 1362, 3 L.Ed.2d. 1512 (1959).
Manual Enterprises, Inc. v. Day,370 U.S. 478, 82 S. Ct. 1432, 8 L.Ed.2d 639 (1962).
Marvin Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973).
Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 86 S. Ct. 975, 16 L.Ed.2d 1 (1966).
Paris Adult Theatre I v. Slaton, 413 U.S. 39, 93 S. Ct. 2628, 37 L.Ed.2d 446 (1973).
People v. Doris, 14 App.Div. 117, 43 N.Y. Supp. 571 (1st Dept., 1897).
People of California v. Alberts, 138 Cal. App.2d Supp. 999, 292 P.2d 90 (1956).
Redrup v. New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L.Ed.2d 515 (1967).
Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973).
Roth v. U.S.; Alberts v. People of California, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed2d 1498 (1957).
Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L.Ed.2d 542 (1969).
Times Film Corp. v. Chicago, 355 U.S. 35, 78 S.Ct. 115, 35 L.Ed.2d 403 (1961).
U.S. v. One Book Called Ulysses, 72 F.2d 705 (2d Circ. 1934).
U.S. v. Orito, 413 U.S. 139, 93 S. Ct. 2674, 37 L.Ed.2d 513 (1973).
U.S. v. Reidel, 402 U.S. 351, 91 S. Ct. 1410, 28 L.Ed.2d 813 (1971).
U.S. v. Roth, 237 F.2d 796 (2d Circ. 1956).
U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 91 S. Ct. 769, 28 L.Ed. 2d 822 (1971).
U.S. v. 12 200 ft. Reels of Super 8mm Film, 413 U.S. 123, 93 S. Ct. 2665, 37 L.Ed.2d 500 (1973).

JUDICIAL DECISION-MAKING: A STUDY IN DISSONANCE

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Legal scholars and practitioners have long been interested in the process of judicial decision-making and have written volumes attempting to explain how these decisions are made. Benjamin Cardozo noted that these explanations do not come easy. He wrote:

> The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times or more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain; he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft.[1]

Nevertheless, "great men" of the law have analyzed those factors which they consider important in making a decision. Most of their discussions concentrate on the desired weight of precedent in judicial decision-making, and while few writers agree, most admit that there is an opportunity for some subjectivity in the application of stare decisis.

In the early 1940's social scientists also became interested in the study of judicial decisions when C. Herman Pritchett began to publish voting records of Supreme Court Justices arranged according to the values they supported.[2] In 1950 Felix Cohen suggested that there was a need "for increased use of statistical methods in the scientific description and prediction of judicial behavior. . . ."[3] By 1961 Joseph Tannenhaus could point to several areas where social science techniques had been used to analyze the judicial process,[4] and there has been a plethora of such studies since that time.

Scholars of persuasion and communication as well as jurists and political scientists have had a long time interest in the factors involved in legal decision - making. Since the time when Aristotle defined rhetoric as the study of all the available means of persuasion, students of communication have been attempting to figure out what factors are persuasive in any given situation to any given decision maker. These scholars have used traditional methods of observation and analysis as well as the newer social science methods of testing and measuring variables associated with judicial decisions. Several techniques have been applied to the study of legal communication. Traditional rhetorical analysis has been used to study an individual advocate or judge or to analyze the persuasion inherent in a particular case or controversy. Students of small group behavior have applied their techniques to analyze the interaction and leadership styles of various courts; Empiricists have tabulated attitudes and correlated them with judicial behavior. Some communication theorists have attempted to analyze the source, medium, message and receiver of specific judicial transactions.

In this essay an attempt will be made to report on a historical analytical study, and an argument will be made that by applying dissonance theory to the process of judicial decision-making, we may provide ourselves with additional insight into that process.

Historical Analysis

In an attempt to discover how the decision-making process at the appellate level worked in relation to First Amendment Law, the development of four Freedom of Speech Concepts were studied in great detail. These were "Symbolic Speech," "Right of Access to the Mass Media," "Hecklers' Veto," and "The Streets as a Public Forum." In doing so, several hundred legal decisions as well as volumes of law review articles and contemporary comment were analyzed. From that study several conclusions were drawn. These conclusions supported both the traditional legal and newer social science research on the legal process.

Traditional scholars of jurisprudence have suggested that there is opportunity within the judicial decision-making process for each judge to express his own values, attitudes and philosophy. The results of this study supported that conclusion. This situation appears to be true because of the flexibility in the application of the principle of state decisis or the use of precedent. That principle relies on the application of reasoning by analogy in which the conclusion drawn from one set of facts can be applied to a similar set of facts. As Benjamin Cardozo said, this is the everyday working rule of the legal process.[5] The rule is capable of individual manipulation, however, for several reasons. In the first place there is often no clear cut analogy from which a precedent can be drawn. This was particularly apparent in the development of the concept of First Amendment protection of symbolic speech, or nonverbal communication. As each new activity sought First Amendment protection there was no generally accepted model which was so obviously analogous that other models were automatically precluded. Draft card burning was not like any other activity. The flag salute was not the same as the display of a red flag. Wearing arm bands in a public school was not the same thing as carrying a placard on a public street. Even demonstrating in front of a courthouse was not the same as marching through a legislative chamber. Therefore, as each new behavior was brought into the judicial arena, each judge had an opportunity to select from among several possible models with which to compare the newest activity. Depending upon whether the particular judge wanted to protect the activity or not, he could choose to use as an analogy a situation in which another activity had either been accorded or denied First Amendment protection. This phenomenon could be seen in the manner in which demonstrations were treated by various judges and justices. Those who were in favor of more restriction on this behavior tended to select labor picketing as the relevant model.[6] Justice Hugo Black exemplified this method of reasoning. Those who would give more protection to demonstrators suggested public forum and leaflet analogies. Justice William O. Douglas typified this attitude on the Court.

Lack of a clear cut model sometimes allows a judge almost totally to disregard precedent and simply weigh what to him are the relevant factors in a given situation. This kind of legal development occurred when public school dress and hair regulations were challenged. The most cited cases in this controversy were two of the earliest cases decided, Burnside v. Byars[7] and Blackwell v. Issaquena County Board of Education.[8] The judge writing the opinion in those two cases created his own supporting arguments without much use of the principle of stare decisis.

A second factor allowing for individual decision making is the existence of several contradictory decisions that can be used for supporting a desired position. This situation is very common prior to a Supreme Court decision on an issue. For example, before the 1897 decision in Davis v. Massachusetts,[9] there were decisions available to support either the idea that city officials could have discretionary authority over streets and parks or that they could not. Depending on a judge's personal attitudes, or the part of the country he was from, he could select which cases to use in support of his arguments. The same situation arose in the picketing cases, the draft card burning cases and

the school regulation cases. In the last instance the same court on the same day handed down two opposing decisions on the same subject, the wearing of "freedom buttons."[10] Both of these decisions were available to support the arguments of other judges in deciding the issue in either of two possible ways. During the formative period of a legal concept, there is a time when the law is very fluid. Different jurisdictions arrive at different conclusions, and these results can be used by still other courts to support whichever position is desired.

A third factor that allows for individual interpretation of the law is the ability of judges to "distinguish away" a relevant case if the result does not support the preferred position of the judge. Of course among lower court decisions, a judge can either simply say that the decision of another lower court judge was wrong, or he can say that it does not apply in his particular jurisdiction.

If a lower federal court judge or a state court judge is dealing with a Supreme Court precedent, the problem is a little more difficult. Cases can still be distinguished, however. One of the methods suggested in the preceding paragraphs also can be applied to this situation. That is, the facts of one case can be distinguished from those of another.

It is also possible for a lower court judge to avoid unfavorable precedents by showing that the situation has changed since the Court made the earlier pronouncement. This technique was especially apparent in the Hague v. C.I.O.[11] conflict where the District and Circuit Courts made the argument that, while their decisions might appear to be contrary to an early Supreme Court holding,[12] they were really consistent with more recent holdings of the Court. Mention was made of recent decisions of the Court which, while not strictly analogous, supported a more liberatarian position than the earlier case.[13]

A lower court judge can also avoid using a Supreme Court decision as precedent if he can point out something about the decision itself which destroys its weight. This technique was particularly obvious in judicial reaction to the Hague v. C.I.O. decision. In the first place, the decision had not expressly overruled the earlier Davis Case, and secondly, there was not a majority opinion. Both of these facts were pointed out in the case of State v. Fowler,[14] where the judge of the Rhode Island Supreme Court upheld the validity of a discretionary permit ordinance in opposition to the intent of the Hague decision. The judge obviously did not feel that the Hague case had to be followed.

For state judges and lower federal court judges, then, there is some opportunity to choose those cases and decisions which they want to follow and to disregard those with which they disagree. This is especially true before a ruling is made by the Supreme Court, but is also true to a more limited extent after such a Supreme Court decision has been made. This study supports the argument that the Supreme Court does not make the first or the last disposition of an issue.[15]

The Justices of the Supreme Court, theoretically at least, have even fewer limits on their ability to make subjective decisions. By the time a case arrives at the Supreme Court, the issue has usually been considered a number of times at the lower court level. The Court has the option of deciding when it wants to hear a case, which gives it some initial control over its decisions. The Supreme Court Justice can also select among those lower court cases those with which he agrees and use them to support his arguments. If a similar case has not been brought before the Supreme Court before, a Justice can simply articulate a new doctrine. In articulating that doctrine, the Court is free to use whatever models it chooses. In the early period of some of the concepts studied, there were few freedom of speech cases from which to choose. As the law began to develop, however, the Court could choose from

public forum cases, leaflet cases, picketing cases or several other analogies. This ability of the Court to select its models according to its desired goals has been discussed earlier.

The only precedents that the members of the Supreme Court have to consider are earlier Supreme Court rulings. If necessary, ways can be found to avoid following even these rulings. For example, Justices can simply admit that they were wrong. This has not happened very often, but it did happen in the compulsory flag salute controversy, and it is an available technique.[16] A Justice who did not participate in a prior decision can formulate a new doctrine which makes the old case obsolete. The Court can decide the instant case on its facts without overruling the earlier case. This was done in Hague v. C.I.O.[17] The Supreme Court can make distinctions on the facts in the same manner as can the lower courts. Such distinctions were made in several of the sit-in and demonstration cases. Adderley v. Florida,[18] for example, relied on distinction between a jailhouse and legislative chamber to distinguish it from Edwards v. South Carolina.[19] Thus, the material considered supported the position taken by several writers, that the opportunity is available in many instances for individual judges to make decisions based on their own perception of what should be done. Roscoe Pound suggested several decades ago that each judge's ideal of the social and legal order was the most important decisive factor in his decision-making.[20] At least the opportunity exists for him to consider that ideal in making decisions.

The second conclusion which was supported by this study was that the inherent complexity of the judicial system limits the effect of an individual judge on the development of the law, and limits the efficiency of that system in arriving at constitutional definitions and standards. Several factors contribute to this state of affairs. The first of these is the tradition of the law and the legal training of the judge. One early study indicated that legally trained persons tended to rely on precedent in making decisions more than did non legally trained individuals.[21] No traditional scholar was willing to take the position that precedent could be totally ignored, nor was any instance found in a legal opinion where a judge or a Justice completely ignored prior development in the law. It would appear, then, that, though judges may be able to mitigate or manipulate precedent, they cannot make their decisions in a total vacuum.

Another factor limits the ability of an individual to affect the development of the law. No individual judge makes a constitutional determination all by himself. In most important cases these decisions are made by groups, and, therefore, one judge may be out-voted. Even in one-judge courts, a judge may be overruled if he does not conform to the views dominant in a higher court. The same factors which make it possible for any individual judge to ignore other cases in a given instance, limit the effect that that judge's decisions will have. The fact that higher courts can overrule lower courts hinders the effectiveness of those lower court judges in determining what the development of the law will be. The ability of lower courts to interpret Supreme Court decisions has already been discussed. That ability limits the power of the Supreme Court or any individual member of the Court.

Even on a particular court, no single judge can dominate the decision-making process very often. This has been most clearly obvious on the Supreme Court where individual Justices seem to take turns being on the winning and losing sides.

While any individual judge or Justice may be able to justify making a decision in almost any direction, his decision may have little long run effect if the majority of the highest court does not agree with his rationale. This supports the statement of Justice Cardozo that the eccentricities of the judges balance themselves off against each other, and that the result is "something which has a constancy and uniformity and average value greater than its component elements."[22]

A further limiting factor on the decision-making ability of the judicial system is that the courts must operate within a specific historical context. That means at least two things. For one thing, the courts reflect society, and mirror those conflicts which exist in society. This results in two limitations. If a conflict does not become very important in society, that conflict does not even reach the courts. If a particular conflict does not become important enough, or if a militant group does not come forward prepared to litigate its claims, the courts can do little about initiating the conflict. Secondly when that conflict does become important enough to create a substantial amount of activity in the courts, it is likely that the disagreements of society will be reflected in disagreements in the courts. There was rarely judicial agreement in any instance among the concepts studied. For example, the law relating to the streets as a public forum seemed to develop along two distinct lines, one supporting the right of freedom of speech and assembly, and the other supporting the right of cities and towns to control public places.[23] Much of this conflict in the judicial system seems to reflect the basic conflict in our society between liberty and order. This conflict was also obvious in the law review commentary. As long as there is substantial disagreement among scholars, journalists, law students and the general population as to the best answers to problems, the disagreement will be reflected in the inability of the judicial system to make efficient decisions.

There was one notable exception to the usual judicial disagreement. That exception occurred with the cases involving desecration of national symbols. This almost unanimous agreement, or at least the absence of any articulate disagreement, is indicative of another limitation on judicial decision-making ability. That limitation is the necessity of the courts to operate within a framework of national acceptance. While it may be true that the courts reflected American society to the extent that they, themselves, did not think flag and draft card desecration to be legitimate protest, it may also be true that the courts did not think that American society would accept that kind of protest. This may illustrate the point made by writer Jack Peltason that the Constitution is only what the judges say it is when the judges represent the dominant interest within the community.[24]

A further limitation on the courts' decision-making ability appears to be the fear of the logical consequences of the "neutral principle." The argument was phrased most clearly in the draft card burning case of Miller v. United States.[25] In that case, Judge Feinberg said that if draft card burning were protected speech, then garbage dumping might be considered protected speech. Judges recognize that a decision does not stand all by itself, but may be used to support an argument in a situation where the results would not, from that judge's point of view, be desirable. That knowledge appears to inhibit the courts from making decisions for which they cannot foresee the ramifications, or where those ramifications appear undesirable.

Even with all of these limitations, however, it does not seem possible to discount the effect that certain individuals have had on the development of the law. A few examples will illustrate the point. Chief Justice Hughes articulated a new doctrine when he said in Stromberg v. California that the display of a flag could be a form of protected expression.[26] Justice Jackson added a new dimension to freedom of speech in the flag salute cases, when he said, "There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas . . . a short cut from mind to mind. . ." and when he struck down the compulsory flag salute by saying, "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[27] Justice Roberts' famous words in Hague v. C.I.O. that, "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from

ancient times, been a part of the privileges, immunities, rights and liberties of citizens,"[28] have been quoted often in subsequent judicial opinions. The substance of the opinion is, of course, important. It is possible to speculate, however, that the powerful phrasing used in that opinion added something in itself to the effect which it had. Justices Frankfurter and Black seem to have been influential in limiting the protection given to picketing.[29] Justice Black's opinion in Giboney v. Empire Storage and Ice Company, furthermore, has been used subsequently to justify almost every limitation on communicative conduct.[30]

This study tended to substantiate, therefore, the positions taken by traditional scholars of jurisprudence as well as by social scientists. That position basically says that the law is made by men, and certain outstanding men can influence the development of the law to a significant degree. However, the judicial process is a complex process, and the judicial system is a complicated one. Therefore, since each individual judge must work within the framework of that system, and within the larger framework of American society, his individual influence is restricted. These same factors, both the individuality of men and the restrictions of the system, inhibit the "efficiency" of the decision-making process. That inefficiency seems to be an inherent part of constitutional interpretation.

Persuasion Within the Judicial Process

Few scholars of judicial decision-making have attempted to fit their material into some coherent theory of persuasion. This writer would suggest that one theory can be helpful in at least illustrating, if not explaining, the judicial process. It appears possible that both the individual decision-making of any judge and the over-all working of the judicial process can be explained as an attempt to arrive at consistency, or more accurately, the appearance of consistency. This need to appear consistent to oneself and to others has been considered by some scholars to be one of the explanations for individual human behavior. It may be that such a theory can also be applied to the development of the law.

There are many concepts of consistency theory, but all of them are based on the notion that opinion, beliefs, behavior and attitudes tend to organize themselves in meaningful ways.[31] Consistency theorists argue that human behavior tends to be consistent. Black Panthers do not usually vote for George Wallace, feminists do not work for the defeat of the Equal Right Amendment, College professors do not oppose academic freedom and members of the American Civil Liberties Union do not normally favor censorship. Furthermore, incidents of internal or external inconsistency are disturbing to most individuals. When a good friend turns out to have diametrically opposed beliefs on an important issue, something seems wrong. When the President of the United States is discovered to be involved in a political scandal, Americans feel uncomfortable, and when a religious leader admits "immoral" conduct, people are shocked.

Consistency theorists say that, not only do people try to see the behavior of others as sensible and predictable, but also that each individual tries to appear consistent to himself.[32] Every person has formed some kind of a self image. Each has accepted certain norms and values, and these form a frame of reference against which new information is evaluated. Most people are uncomfortable when that new information is inconsistent with their old frame of reference. When such a situation occurs, the individual attempts to correct the situation. E. B. Bettinghaus explains: "The common thread linking various balance theories is the notion that an individual constantly strives toward consistency in his perceptions, attitudes, memories and beliefs. When a stimulus object is seen as 'not belonging' with existing conditions, tensions are created within the organism, and attempts are made to restore balances."[33] Leon Festinger, who is responsible for one of the most widely discussed consistency theories, has described this theory of cognitive dissonance in this manner; "This theory centers around the idea that if a person knows various

things that are not psychologically consistent with one another, he will, in a variety of ways try to make them more consistent. Two items of information that psychologically do not fit together are said to be in a dissonant relation to each other."[34]

Some of the characteristics of judicial decision-making and the development of constitutional law may make it possible to apply these theories to explain some judicial behavior. One of these characteristics is the likelihood that judges and Justices have an established hierarchy of values before they are appointed or elected to the bench. This probability has been supported by attitude studies,[35] and seems even more likely to be true in First Amendment law than in other areas. Furthermore, judges may hold values which can become conflicting in specific case situations. A judge may value both freedom of speech and respect for a national symbol. Justice Frankfurter valued both freedom of religion and the building of patriotism. This was apparent in the flag salute cases. Many judges value both freedom of speech and law and order. Perhaps Justice Black was an example of this conflict. Other judges may consider both freedom of the press and the right of access important. A situation which forces a choice between two alternatives is a potential situation for cognitive dissonance.

The situation can also arise when the conflict is between a substantive value such as freedom of speech, and a procedural value such as the role of stare decisis. If a judge feels strongly that precedent should be followed, and yet feels that the precedent cases are wrong, he has a difficult choice to make. Or he may feel that the Supreme Court should not reach the constitutional issues if it can avoid it, and yet he may think that a lower court decision must be overturned. A judge must find some way to resolve these conflicts.

Ordinary people commonly use methods of self persuasion usually referred to as defense mechanisms. One such mechanism is selective exposure. It was found, for example, that new car buyers read advertisements for their own kind of cars more often than for cars that they considered, but did not buy.[36] In another instance, college students who had been given a choice as to the kind of exam to be taken for a particular course indicated that, after the choice had been made, they preferred to read positive information about the type of examination that they had chosen.[37] In still another case, it was found that voters listen to and read those sources that support their own viewpoints and avoid those that do not.[38]

A second method of defense is distortion. If a respected authority says something which a listener does not think is consistent with his own viewpoint, he may change the meaning of what was said to fit his own evaluation of the facts. Some research has supported the idea that, when a "good" source is reported to approve a "bad" message, the subjects had a tendency to restructure the message.[39] A common example is the difference in interpretation, by smokers and non-smokers, of the evidence that smoking is correlated with incidence of cancer or between users and non users that oral contraceptives have harmful effects.

Another defense mechanism is forgetting or selective recall. Everyone forgets much of the information that he is exposed to. There is evidence, however, to support the idea that people both learn material more easily and retain it longer if it coincides with their beliefs or reinforces their decisions. Material or evidence presented which is not acceptable to the individual on a personal level may well be forgotten. Or the individual may use the technique of disassociation. He may forget the source, but remember the message or do just the reverse. He can remember whichever best serves his own values.[40]

Each of the above conclusions has some experimental support. We might well ask, therefore, if a judge or justice might use any of these defense mechanisms in his decision-making.

If a judge's values do not conflict in a given situation; if precedent supports the decision that he wants to make; and if making that decision is consistent with his view of his own role, there is no problem, no inconsistency, and no necessity for self-persuasion. If, however, conflicts do occur, some defense devices appear to characterize judicial decision-making. One of these methods is to increase the weight of the chosen value, while decreasing that which is not chosen. Those advocates of law and order, for example, will build up the importance of law and order by making it appear that complete chaos is imminent. Justice Jackson did this in the Terminiello v. Chicago[41] dissent, and Justice Black used the same technique in Tinker v. Des Moines,[42] which granted protection to school children wearing black arm bands as a symbol of protest. Justice Black apparently thought such protection would cause a breakdown of discipline in the nation's schools. Both of these Justices obviously valued both freedom of speech and order. In these instances they chose to rank law and order very highly, and their opinions seem to show an exaggeration of the situation in an attempt to justify their choice.

A second technique described by advocates of consistency theory is the attempt either to distort information or use it selectively to reinforce a choice. Some of the ways precedent is handled illustrates this technique. When alternative pieces of information are available, a judge sometimes selects that which supports his own point of view. Occasionally this involves some rather elaborate distinctions of facts or situations, and sometimes even requires taking part of an opinion out of context. At other times judges appear simply to ignore some cases in favor of those which do support their position.

The elaborate methods that some members of the Supreme Court have used to avoid facing constitutional issues illustrates another method of resolving cognitive dissonance. That method is to redefine the situation in ways which eliminate the conflict. That is, if the Court wants to support freedom of expression by overruling a lower court decision, but does not want to make a constitutional pronouncement, they find a way of changing the issue to one which they can decide. Thus in Street v. New York[43] the issue was changed from one of flag burning to one of verbal remarks relating to the flag. In Terminiello v. Chicago[44] the issue was redefined from a near riot to speech which aroused dissent. In another case the conflict was changed from one of war protesters laying down and obstructing traffic to one of the hostile audience.[45] There was an avoidance of the most obvious issue in order to avoid apparent conflict between opposing sets of values.

It is not too difficult to speculate that individual judges might often find themselves in situations where they are forced to make choices involving their own values. If one accepts the possible validity of dissonance theory in explaining individual actions outside the judicial system, it seems logical to accept that explanation of individual judicial behavior. It is suggested that the model presents at least a possibility for analysis.

The very basis of law, especially constitutional law, implies the necessity for some kind of consistency. A claim is made for equal treatment under the law. Benjamin Cardozo said, "It will not do to decide the same question one way between one set of litigants and the opposite between another."[46] The working rule of state decisis and the theory of "neutral principles" are also based on the assumption that decision-making is not entirely an ad hoc process, but must be consistent. Vague ordinances and discretionary authority are struck down because such laws allow for too much discretion and too little consistency.

On the other hand, there is a strong feeling among many judges and many scholars of jurisprudence that the constitution and the law must fit the particular situation. Legal realists and proponents of sociological jurisprudence have argued that decisions must be made in light of what is best for society

at a specific time. These two ideas sometimes conflict. Few judges have simply abandoned any attempt to make the law appear consistent. Few have simply overruled earlier decisions on the basis that they no longer apply. Rather, almost every judge finds it necessary, sometimes almost painfully, to justify his decisions in light of previous decisions. This has been seen repeatedly throughout this study. This conflict and its resolution have appeared so typical of the operation of the judicial process that it seems appropriate to remember the 1881 statement of Justice Oliver Wendell Holmes whose description of the judicial process may still be the most accurate written. Justice Holmes said:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have a great deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corrolaries of a book of mathematics. In order to know what it is, we must know what it has been and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every state. The substance of law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.[47]

Or perhaps it would be even more appropriate to remember the words of Thurman Arnold when he described legal "myths" which many Americans find it necessary to accept. He noted that "Human institutions, in an environment which worships reason, fail in influence and prestige unless they appear to be firmly grounded on reason and fundamental principle."[48] He then discussed certain "myths" such as the impartiality and rationality of the judicial process and concluded that, "in spite of all the irrefutable logic of the realists, men insist upon believing that there are fundamental principles of law which exist apart from any particular case, or any particular human activity . . . . The truth of such a philosophy cannot be demonstrated or proved. It exists only because we seem unable to find comfort without it."[49] Maybe now, years later, after the unrest of the 60's and the disillusion of Watergate, we may be able to explore the possibility that judges, like ordinary people, act inconsistently and for their own comfort as well as their reputations; occasionally and maybe even habitually use "defense mechanisms" to appear consistent and make the "Law" appear rational. Then, indeed, the life of the law would not be logic, but experience, common human experience.

Endnotes

[1]Benjamin Cardozo, The Nature of the Judicial Process (New Haven, 1921), p.9.

[2]David J. Danielski, "Values as Variables in Decision-Making," The Federal Judicial System, ed. by Sheldon Goldman and Thomas Jahnige (New York: Holt, Rinehart and Winston, Inc., 1968), p. 244.

[3]Felix S. Cohen, "Field Theory and Judicial Logic," Yale Law Journal, 59j (1950), 265.

[4]Joseph Tannenhaus, "Supreme Court Attitudes Toward Federal Administration Agencies 1947-1956--An Application of Social Methods on the Study of the Judicial Process," Vanderbilt Law Review 14 (1961), 473.

[5]Cardozo, p. 20

[6]Adderly v. Florida, 385 U.S. 39 (1966); Edwards v. South Carolina, 372 U.S. 220 (1963); Cox v. Louisiana, 379 U.S. 536 (1965).

[7]Burnside v. Byars, 363 F. 2d. 744 (1966).

[8]Blackwell v. Issaquena County Board of Education, 363 F. 2d. 749 (1966).

[9]Davis v. Massachusetts, 167 U.S. 43 (1897).

[10]363 F. 2d. 744; 363 F. 2d. 749

[11]Hague v. C.I.O., 101 F. 2d. 774 (1939); C.I.O. v. Hague, 25 F. Supp. 127 (1938).

[12]167 U.S. 43.

[13]Lovell v. Griffin, 303 U.S. 444 (1938).

[14]State v. Fowler, 83 A. 2d. 67 (1951).

[15]Jack Peltason, Federal Courts in the Political Process, (New York, 1955), p. 14.

[16]West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[17]Hague v. C.I.O., 307 U.S. 496 (1939).

[18]Adderley v. Florida, 385 U.S. 39 (1966).

[19]Edwards v. South Carolina, 372 U.S. 220 (1963).

[20]Roscoe Pound, "The Theory of Judicial Decisons," Harvard Law Review, XXXVI (1923), 645.

[21]Theodore Becker, "Legal Training and State Decisis," The Federal Judicial System, Ed. Thomas Jahnige and Sheldon Goldman, (New York, 1968).

[22]Cardozo, p. 33.

[23]Ruth McGaffey, An Analysis of the Origin and Development of Selected Freedom of Speech Concepts, Unpub. Ph.D. Dissertation, (Northwestern, 1970).

[24]Peltason, p. 14.

[25]Miller v. United States, 367 F. 2d. 72 (1966).

[26]Stromberg v. California, 283 U.S. 359 (1930).

[27]319 U.S. 624.

[28]307 U.S. 496

[29]McGaffey, pp. 148-172.

[30]Justice Black wrote, "It rarely has been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an

integral part of conduct in violation of a valid criminal statute. We reject that contention now. . . ."Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949).

[31]R. Zajonc, "The Concepts of Balance, Congruity, and Dissonance," 24 Pub. Opinion Quarterly 280 (1960).

[32]Ibid.

[33]E. B. Bettinghaus, "Cognitive Balance and the Development of Meaning," Journal of Communication, XII (1963), 94.

[34]Leon Festinger, A Theory of Cognitive Dissonance (Stanford, 1957), p. 3.

[35]Glendon Schubert, "Judicial Attitudes and Voting Behavior;" David Danielski, "Values as Variables in Decision-Making," in The Federal Judicial System, Ed. Thomas P. Jahnige and Sheldon Goldman, (New York, 1968).

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[38]W. Fotheringham, Perspectives on Persuasion (Boston, 1966) p. 177.

[39]H. Lewis, "An Experiment on the Operation of Prestige Suggestion," in T. Newcomb, Readings in Social Psychology (1947) p. 232.

[40]Fotheringham, 196-197.

[41]Terminiello v. Chicago, 337 U.S. 1 (1949).

[42]Tinker v. Des Moines, 393 U.S. 504 (1969).

[43]Street v. New York, 22 L. Ed. 2d. 572 (1969).

[44]337 U.S. 1.

[45]Bachellar v. Maryland, 25 L. Ed. 2d. 570 (1970).

[46]Cardozo, p. 14.

[47]Oliver Wendell Holmes, The Common Law (Boston, 1881), pp. 1-2.

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IMMANUEL VELIKOVSKY: A CASE STUDY IN THE SUPPRESSION OF SCIENTIFIC IDEAS

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> Scientific knowledge, like language, is intrinsically the common property of a group or else nothing at all.[1]

Addressing the morality of public discussion, John Stuart Mill wrote in his Essay on Liberty: "He who knows only his side of a case knows very little of that." Most people know very little of Immanuel Velikovsky. Little is known because "once the reception of a common paradigm has freed the scientific community from the need to constantly re-examine its first principles," more subtle and esoteric phenomena may be considered and efforts at establishing new paradigms are pushed aside.[2]

Nevertheless, as early as 1950 in Worlds in Collision, Velikovsky was able to predict that future space probes would find radio noises on Jupiter and that the earth's magnestosphere extends beyond the moon. He was correct in predicting the relatively hot (compared to earth) temperatures found on the planet Venus over a decade before a space probe got there to measure it. But most people have forgotten--or perhaps more accurately, never knew. The question is Why.

It is the thesis of this author that establishment science functions as an institutional inhibitor of free expression of scientific ideas, and, often consciously, has sought to and succeeded in the suppression of the Velikovsky paradigm. At least three reasons for such suppression are immediately apparent: (1) major changes in theories necessitate rewriting textbooks in many areas, an expensive and time-consuming tasks; (2) a psychological readjustment is required for the public mind; and, perhaps most importantly, (3) the often lengthy careers of some very reputable scientists are at stake. As Velikovsky himself put it:

> The impact of such a theory is that you have to rewrite most of the textbooks . . . besides, the impact is psychological because of the inability to see things so clearly exposed, so many times documented by ancient sources. You have to be willing to see the facts and to feel the past. So this is a psychological phenomenon . . . it is also a phenomenon of vested interests because so many people wrote and taught and came to congresses with papers and now it is almost all wrong.[3]

Background:

Immanuel Velikovsky was born in Vitebsk, Russia on June 10, 1895. He learned several languages as a child and in 1921 received his medical degree from the University of Moscow. He traveled to Berlin where, with Professor Heinrich Loewe, he founded and published Scripta Universitatis, conceived as a cornerstone for what would become Hebrew University in Jerusalem. In 1923 he began a medical practice in Palestine, and after studying in Vienna under a student of Freud's, he began practicing psychoanalysis. In 1930, Velikovsky was the first to suggest that pathological encephalograms would be found characteristic of epilepsy.

Dr. Velikovsky came to the United States in the summer of 1939 seeking to complete research for a book about Freud's dreams. His particular focus on the characters of Moses, Oedipus and Akhnaton led to discoveries that substantially altered the course of his life.[4]

His initial investigation was in the field of ancient history where, as Ransom points out, there "appears to be very little correlation between certain time periods of the history of Egypt and Hebrew history, though these nations resided side by side and supposedly interacted extensively."[5] Through his investigation of this historical problem, Velikovsky was eventually led to his discovery that the literatures of the ancient worlds contained descriptions of global catastrophies. Catastrophism was soon to become the core of a new world-view, a contemporary paradigm to confront establishment science.

Predictions: Theories, by definition, must have predictiveness. Disclaiming any personal support for Velikovsky, on December 21, 1962, Professor Valentin Bargmann of the Department of Physics of Princeton University and Professor Lloyd Motz of the Department of Astronomy of Columbia University published a letter in Science magazine claiming Velikovsky's priority of prediction of three phenomena:

> (1) the very high surface temperature of Venus, which came as a complete surprise to astronomers, most of whom considered the temperature to be only slightly greater than that of the Earth;
>
> (2) the existence of a magnetosphere around the Earth reaching the moon, suggested by Velikovsky in 1956 and discovered by Van Allen in 1958;
>
> (3) the existence of radio signals emanating from Jupiter.[6]

An article in the April 1967 issue of Yale Scientific Magazine points out, it was "vindication of this third prediction" which had such a significant "impact on Albert Einstein when he learned of it in 1955 only days before his death, that he offered to use his influence to arrange for other experiments" which would further confirm the ideas of Velikovsky. However, "Einstein died before he was able to carry through his intention."[7]

The Age of Velikovsky offers further testimony to the interest and support of Einstein:

> Einstein was convinced that space must be free of magnetic fields and plasmas and that there would thus be no reason for Jupiter to emit radio waves. . . . He was so impressed with the discovery that he offered to assist Velikovsky in having other investigations performed. But it was too late; Einstein died the next week. A copy of Worlds in Collision lay open on his desk.[8]

Stephanos points out that unexplained "thermal radiation from the planets has been found in excess of radiation arriving from the Sun and may have its origin in cataclysmic events of the past."[9] In addition, he summarizes:

> Venus . . . a protoplanet only a few thousand years ago, in Velikovsky's view, is excessively hot . . . the Moon now gives evidence of an internal reservoir of heat; and Jupiter is even classed as a star in its own right by some astronomers because of its energetic radiation.[10]

In particular, Venus poses exceptions to the theories offered by establishment science:

> Venus confounds both the classical theories of solar system origins--the nebular and the tidal theories-- by rotating in the wrong direction. More than that, it now appears to be rotating in such a manner that each time it passes between the Earth and the Sun, it presents the same face to the Earth, as if preserving a synchronism acquired through near contacts in the past.[11]

A new theory is seldom an increment to what is already known and is often, in fact, incompatible with existing theories.[12] Nevertheless, "lack of a standard interpretation or of an agreed reduction to rules will not prevent a paradigm from guiding research."[13] The theories and ideas of Velikovsky offer reasonable if not yet completely verifiable explanations for these phenomena and for many more. As a result, Velikovsky is contributing to a new movement of disbelief among persons who once viewed establishment science as near-omniscient.

Problems of Proof:

A public charge of establishment science is that Velikovsky is unable to quantify his theories and thus they are merely conjecture. Since pre-Aristotelian times, knowledge has often rested upon the inductive validity of cumulative experiences. It is these experiences that Velikovsky has collected through countless ancient manuscripts. A clear situational problem is the lack of witnesses to the creation of the universe and other various events in question. Furthermore, we are not likely to witness similar creations or events. This problem equally plagues establishment science.

Nevertheless, many ancient records through culturally varied manuscripts do exist and testify to certain world-wide and apparently catastrophic occurrences, particularly involving the effects of close encounters of the planets Earth, Venus, and Mars.

Oregon State university physics professor, Charles Drake, has "stated that Velikovsky's theory is not a scientific theory" but that "Velikovsky is simply a historian."[14] However, Dr. C.J. Ransom, a graduate of the University of Texas at Austin specializing in plasma physics and currently employed at General Dynamics, Fort Worth, Texas maintains "the inadequacies of present theories for the formation of the planets" and contends that a "look at entire alternative approaches" is needed. Ransom who is also Executive Director of Cosmos and Chronos, Inc. and a Senior Editor for Kronos Press (both pro-Velikovsky organizations), further believes that Velikovsky's theory has demonstrated its predictive value.[15] For, IF the events happened, THEN the results should be observable today. And, these results are observed.

Ransom's book, The Age of Velikovsky, provides a review of major and some minor points of Velikovsky's work and provides supporting evidence--not that the events described DID take place but that they ARE physically possible.

The Nature of the Suppression:

A recurring problem has been the suppression of testing which might confirm Velikovsky's theories. Many of the needed tests have not been carried out since, as an individual, Velikovsky does not have access to carbon-dating facilities (although not always reliable) nor is he in a position to determine the types of tests conducted via space probes, etc. Ransom's book recounts numerous incidents of requests for various tests which were denied supposedly because Velikovsky was not identified with a major educational institution such as a museum or university.[16]

The first major incident of suppression occured within two months of the publication of Worlds in Collision in April 1950 by the Macmillan Company:

> . . . [it] aroused the furor of the scientific community . . . The President [of Macmillan] . . . told Velikovsky that professors in certain large universities were refusing to see Macmillan salesmen and that letters demanding the cessation of publication of the book were arriving from a number of scientists.[17]

Eventually, the Doubleday Company, not financially vulnerable because it had no textbook division, purchased the publication rights and continued printing the book.

Numerous less obvious events took place, but the next significant incidence occurred in 1967 when the Franklin Institute in Philadelphia banned a lecture by Dr. Velikovsky. An invitation by one of the nation's older astronomical societies, founded in 1882--the Rittenhouse Astronomical Society--was extended September 16, 1966 to Dr. Velikovsky suggesting Friday evening, April 7, 1967 for his appearance at the Franklin Institute Lecture Hall--the Society's regular meeting place.[18]

A series of political incidents spanning several months and banning Velikovsky from the Franklin Institute because of his controversial theories resulted in moving the meeting to the auditorium of the Free Library on Logan Square. The president of the Philosophy Club of Temple University wrote with two others to the Philadelphia papers on February 11, 1967:

> We read with astonishment that the doors of the Franklin Institute are closed to a lecture by Dr. Immanuel Velikovsky . . . . It is difficult for us to believe that a timid decision, in terror of the ghosts of opposition laid years ago, represents the true standards of a proud institute, especially now when the space probes and other researchers have produced so many confirmations of the Velikovsky thesis.[19]

On February 15, 1967, the Philadelphia Inquirer included this statement in an editorial:

> . . . a spokesman for the Institute said that it was banning the lecture clearly because Dr. Velikovsky was controversial and because the bulk of the scientific community disagreed with his theories.[20]

The most important incident to date occurred at the 1974 AAAS (American Academy for the Advancement of Science) Conference. The conference is fully described in Chapter VIII of The Age of Velikovsky. Ransom also observes:

> The AAAS meeting was advertised as a scientific appraisal of Velikovsky's theory. But, at the very opening of the meeting, the attendees were informed that the subject was not worthy of scientific discussion and the meeting was being held to point this out to any minds which had strayed from the uniformitarian faith.[21]

Not infrequently as at the AAAS meeting and elsewhere, the "refutations" of Velikovsky's work appear to be based not on his Worlds in Collision but rather on the incomplete synopsis published in 1950 in Collier's Magazine:

> . . . the presentation was not substantial. The editor of Collier's published two parts of a planned three part series . . . but Velikovsky so objected to the exceedingly improper treatment given the work that the third part was never published.[22]

Most recent is the continued refusal of significant scientific journals to accept pro-Velikovsky materials. As one United Kingdom publication summarizes:

> The activity of the 'scientific' prejudice is evident in recent events at Science News where, after accepting and running small ads earlier this year for The Age of Velikovsky and for Velikovsky and Establishment Science, the magazine has abruptly refused to run any more. The ad agency was informed that "the editor and publisher (of Science News) reversed their original decision to accept the 'Velikovsky' ads . . . ." Why?
>
> At Science News they won't tell you . . . . when "asked why ads for UFO slides, tape cassettes and books are acceptable but pro-Velikovsky ads are not," the response from Publisher Ted Sherburne was "no comment."23

The same article further identifies the widespread nature of the problem:

> On the negative side is the continued refusal of such journals as Sky and Telescope and Scientific American to accept advertising, articles or even letters dealing with Velikovsky's ideas.24

Letters to this author in the spring of 1978 further verify these refusals and include copies of the small, unobtrusive ads that were banned. This author sent an inquiry to Science News that was never acknowledged. In response to a copy of the same letter, a friend and physicist at David Lipscomb College responded:

> Apparently Science News is also deficient in a sense of fairness. I find it incredible that they would cancel ads for a book. I agree with you that such suppression is dangerous.25

Physics Today did publish a letter from Ransom in December 1978. However, tokenism has limited value:

> . . . in 1971, Physics Today wrote me that Velikovsky's ideas need no longer be discussed in that periodical. Just this year [1978], Science News cancelled continuing ads . . . stating that they would no longer run ads on 'that subject' . . . but the next week ran an ad for Scientists Confront Velikovsky. What both periodicals meant to say was that only one side of the issue would be allowed. The Soviets claim suppression of ideas protects the public from confusion. From the action of some scientists here, one could easily conclude that they believe in the selective use of 'protective measures.'26

Further specific incidents are reviewed in the consideration of techniques of suppression.

A common technique of suppression used to refute the ideas of Velikovsky is to attribute statements to him not his own and then to disaprove them:

> Hodges made a joke, suggesting that perhaps the mission had proved one of the controversial theories of . . . Velikovsky [who] contended that Venus originated outside the solar system and was later captured by the sun's gravity. "I don't think so," Hoffman said. "Venus has a very circular orbit. If it came from outside the solar system, it probably would have a highly elliptical orbit, like most comets."27

The effect of such misinformation, especially on the front page of The Houston Chronicle, is irreversible. More accurately, Velikovsky maintains that Venus broke away from Jupiter (hence the large red spot on Jupiter) after the formation of this solar system and traveled in a comet-like fashion having a close encounter with the Earth before eventually becoming located in its present orbit. This also explains why Venus appears to "spin backward" (not in rotation like other planets in this solar system), why it faces the earth each time the two orbits are closest, and why Venus contains Argon 36 three hundred times in excess of that found on Earth. This close encounter between the planets also explains some of the global catastrophies recorded in ancient histories, in part accounting for large petroleum deposits throughout the Earth as well as plagues recorded in ancient Hebrew literature.

Comparable inaccuracies were reported in a January 9, 1979 story in the Fort Worth Star Telegram.[28] As Ransom had indicated, it is the lack of opportunity to respond publicly to such inaccuracies that further compounds the situation.[29] Such widespread instances only serve to magnify further the suppression.

Carl Sagan, Harvard trained physicist now at Cornell University, is the most popularized and outspoken of Velikovsky's critics. Supporters of Velikovsky can only hope that, as with Anita Bryant and the Gay Rights Movement, the attention that Sagan draws to the issues with his flamboyance offsets the techniques that he uses. In his presentation before AAAS in 1974 (a presentation which required two years of editing and rewriting apparently before being suitable for publication), as well as in public appearances including the Johnny Carson show, Sagan with "entrancingly arrogant" and charismatic delivery made many statements containing "fictional qualities."[30]

Quoting a letter from Ransom, dated May 31, 1978, to William T. Abbott, Senior Counsel, Law Department, National Broadcasting Company:

> . . . Carl Sagan made demonstrably false statements at a meeting of the American Association for the Advancement of Science . . . related to the works of . . . Velikovsky.
>
> For your purposes, it does not matter if Velikovsky is right or wrong. What is important is that we have documented support for the opinion that Sagan is either (1) exceedingly stupid (which he is not); (2) extremely careless (which he may be); or, (3) fraudulent. Since many of his mistakes and misrepresentations were pointed out to him before he published them in a book, it is easy to suspect #3. Documentation is fully available in Velikovsky and Establishment Science and in The Age of Velikovsky.

Thus, at least inadvertently, the mass media have contributed to the further suppression of the ideas.

Other suppressive efforts focus on attempts to destroy Velikovsky's credibility as a source. Although credentials, or the lack thereof, can be no substitute for logic and evidence, critics frequently attack Velikovsky's credibility because his formal training is in medicine, language and psychology rather than in celestial mechanics of cuneiform languages since manuscript translations of the latter are used in his books extensively (Egyptian chronology is demonstrated quite articulately by Velikovsky to be "off" by approximately five hundred years).

Nevertheless, with respect to credentials, the organizers of the 1974 AAAS conference apparently had no qualms about identifying one Peter Huber, Professor of Mathematical Statistics at the Swiss Federal Institute of Technology, as instead a Professor of Ancient History when in fact the area is his "hobby."[31]

These same organizers excluded Lynn E. Rose, Professor of Philosophy at State University of New York at Buffalo, a Velikovsky supporter, because his degree was "not in the hard sciences" and similarly excluded Ransom whose Ph.D. is in plasma physics, because "he was employed by a corporation rather than by a university." Quoting from a letter from Rose to Professor Owen Gingerrich, Professor of Astronomy and the History of Science, Center for Astrophysics at Harvard University, dated May 15, 1978:

> . . . rigid criteria that served to exclude strongly pro-Velikovsky panelists . . . suddenly and curiously became very flexible when a self-styled "hobby-assyriologist" wanted to present what he took to be "early cuneiform evidence" against Velikovsky.[33]

And so both the suppression and the contemporary effort continue with much name-calling and challenging of credentials by supporters as well as critics.

What, then, has been the result of the advertising ban and of the limited forum for expression by the Velikovsky supporters?

The Social Movement:

As is often the case when a group, however small, perceives threat to its existence and/or identity, it becomes more cohesive and seeks alternative outlets to relay its messages. Thus, the Velikovsky supporters have slowly built their numbers. As Ransom points out in his letter published in Physics Today:

> . . . the range of Ph.D. physicists actively investigating Velikovsky's work includes experts in celestial mechanics, spectroscopy, thermodynamics and plasma physics. Numerous scientists trained in fields other than physics are also investigating the ideas.[34]

In an interview with Ransom by this author in Arlington, Texas on October 5, 1978, he indicated that the core group of the movement probably numbers some 4,000 with 3,000 as regular subscribers to the Kronos Publications and perhaps a peripheral interest population of some 20,000.[35]

George Early summarizes the spread of the movement in Fate by observing that ". . . approximately 12-15 lectures series/symposiums" have been held since the AAAS meeting "along with a mounting flood of publications and organizations dedicated to open discussion, argument and critical analysis of Velikovsky's theories."[36]

Conclusions:

The effort of scientific historians is a "persistent tendency to make the history of science look linear or cumulative:"[37]

> . . . scientists of earlier ages are implicitly represented as having worked upon the same set of fixed problems and in accordance with the same set of fixed canons that the most recent revolution in scientific theory and method has made seem scientific.[38]

Kuhn describes scientific research as a "devoted attempt to force nature into the conceptual boxes supplied by professional education" and yet "the major turning points in scientific development associated with the names of Copernicus, Newton, Lavoisier and Einstein" are the results of the adoption of new world views necessitating "rejection of one time-honored scientific theory in favor of another incompatible with it."[39]

In a letter to the author, dated April 14, 1978, Ransom observed:

> Velikovsky may not be right about everything, but the fact that the opposition has had to resort to suppression again after 28 years makes it apparent that he is asking questions they cannot answer.[40]

When asked "if the congratulations for his contributions are belated, he [Velikovsky] simply responds, '. . . considering the dimensions of the disturbance that I brought into conservative teachings in many fields, twenty-eight years is not too long to wait.'"[41]

Unlike great medical or technological advances that quickly impact millions of persons, verification of the accuracy of Velikovsky's theory is not crucial. Yet, as Velikovsky observes, ". . . you have some things to learn without regard for whether tomorrow you can make money out of it."[42]

The Velikovsky movement offers an alternative view of the history of Earth and this solar system--a new paradigm and consequently a new set of first principles. Whether these ideas remain generally suppressed by establishment science or whether a new scientific revolution is emerging remains to be observed.

Endnotes

[1]Kuhn, Thomas S., The Structure of Scientific Revolutions. University of Chicago Press (Chicago: 1970), p. 210.

[2]Kuhn, p. 163

[3]"Velikovsky: Will Venus findings finally exonerate him? by David Adler in "The Science Forum," Oregon Herald, December 27, 1978.

[4]Ransom, C.J., The Age of Velikovsky. Kronos Press (Glassboro, N.J.: 1976), p. vii. (PPB Delta, New York, 1978)

[5]Ransom, p. 2

[6]Hudspeth, Stephen M., "Creativity and Acceptance in the Sciences" Yale Scientific Magazine, April 1967, p. 30.

[7]Hudspeth.

[8]Ransom, p. 113; also in The Velikovsky Affair edited by Alfred de Grazia. University Books: 1966 (out of print), p. 39.

[9]Stephanos, Robert, "Ben Franklin's Town: Where 'Lightning Strikes Twice,'" Yale Scientific Magazine, April 1967, p. 28.

[10]Stephanos.

[11]Stephanos.

[12]Kuhn, pp. 5-6.

[13]Kuhn, p. 44.

[14]Oregon Herald, December 27, 1978.

[15]Oregon Herald.

[16]Ransom, p. 2

[17]Hudspeth, p. 30.

[18]Stephanos, p. 28.

[19]Stephanos, p. 27.

[20]Stephanos.

[21]Ransom, p. 3.

[22]Ransom, p. 7; The Velikovsky Affair, p. 20.

[23]Early, George W., "Velikovsky Confronts His Critics," Fate: The World's Mysteries Explored, February 1979, U.K., pp. 82-88.

[24]Early, p. 82.

[25]Letter from Fletcher D. Srygley, Department of Physics and Engineering Science, David Lipscomb College, Nashville, Tennessee, April 14, 1978.

[26]"More on Velikovsky," letter published in Physics Today by C.J. Ransom, December 1978, p. 81.

[27]"Finding Big Amounts of Primordial Argon in Clouds of Venus has Scientists in Tizzy," by John Noble Wilford in The Houston Chronicle, January 8, 1979, p. 1.

[28]"With new Venus data, it's back to the drawing board," by Donna Darovich, Fort Worth Star Telegram, January 8, 1979.

[29]Letter from C.J. Ransom, January 15, 1979.

[30]Ransom, The Age of Velikovsky, p. 224.

[31]Letter to William T. Abbott, Senior Counsel, Law Department, National Broadcasting Company, from C.J. Ransom, May 31, 1978.

[32]Ransom, The Age of Velikovsky, p. 216.

[33]Letter to Owen Gingerrich, Professor of Astronomy and the History of Science, Center for Astrophysics at Harvard University, from Lynn E. Rose, May 15, 1978.

[34]Ransom letter in Physics Today.

[35]Interview with C.J. Ransom by the author, October 5, 1978, Arlington, Texas.

[36]Early, p. 86

[37]Kuhn, p. 139.

[38]Kuhn, p. 138.

[39]Kuhn, p. 6.

[40]Letter from C. J. Ransom, April 14, 1978.

[41]Oregon Herald, December 27, 1978.

[42]Oregon Herald.

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FREEDOM OF EXPRESSION AND RHETORICAL ART: THE PROBLEMS OF AVANT-GARDE JAZZ

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In our media-oriented world the control of communication channels can be a significant institutional barrier to the free flow of ideas through the social structure. In the area of news reporting the power of broadcast media to set the social agenda and distort the perception of events has been a widely investigated hypothesis in broadcast research.[1] Less often investigated is the power of the entertainment industry to expose selectively talent to the mass audience; yet, the consequences of this power, though not as obviously threatening as the control of news, can have an important bearing on our cultural values.

By controlling the means by which musicians may reach a mass audience, the music industry has the power to exercise a great deal of control over popular musical expression. An artist without recordings has little chance of gaining any recognition transcending the local level. An artist whose recordings are not vigorously promoted by the record company is only a little bit better off. When this process of media selection involves music that seeks to be more than mere entertainment, a freedom of expression issue can arise. This has been precisely the situation encountered by record companies in their relations with avant-garde jazz. As a music representing a social minority and, at least in some cases, having rhetorical intent, avant-garde jazz has had trouble finding outlets for exposure. This, some industry critics charge, has been the result of a racist institutional structure seeking to supress free musical expression.[2] This essay will sketch the rhetorical nature of the avant-garde and examine those charges of racism directed at the record industry.

I

Though a full definition of jazz is outside of the purview of this essay, it can be safely stated that this musical form is a uniquely Afro-American music. It originated from a collision of musical traditions and owes as much to European harmonic concepts as it does to African rhythmic and melodic ideas.[3] Developing from the experiences of the black community, it is a music that expresses and is responsive to the atmosphere of the black community. Some jazz writers have taken this concept one step further by suggesting that jazz not only reflects, but stimulates black consciousness of identity. Ben Sidran has argued that black culture, being an oral tradition, relies heavily on music and speech to transmit values and attitudes.[4] In this more radical interpretation of the relationship of jazz to the black community all jazz passes, to some degree, beyond the merely aesthetic to the rhetorical. In a more restricted sense the stimulation of black identity has been an identifiable rhetorical motive behind some of the musical movements of jazz in the past thirty years.

The bebop movement of the forties was the initial appearance of a true avant-garde in jazz. In any art the avant-garde is that group that consciously seeks to expand the boundaries of that art through experimentation with the form. Prior to the bebop school's fully conscious attempt to drive jazz in a new direction for the sake of the art, it is rather difficult to speak of an avant-garde in the jazz world. Louis Armstrong and Duke Ellington were mon-

umental jazz innovators but no jazz writer has ever seriously suggested that they formed an avant-garde movement. Perhaps the most telling element in favor of labeling the bebop movement as the first true jazz avant-garde was its flavor of rebellion against commonly accepted musical standards of the time. The innovators of bebop made increased use of difficult augmented and diminished chords, placed a heavy emphasis on the improvisation of new melodies over the revamped chord structures of popular tunes (often rendering the original tune unrecognizable) and utilized extremely challenging tempos. Through these devices, bebop sought to expand the artistic horizons of jazz through a conscious process of creation. The movement also sought to improve the public image of jazz as a simple folk musical or a form of mere entertainment for the dancehall or nightclub. It also called into question the image of the happy, swinging "darkie" entertainer.

The dance beat of the swing era, with its accented second and fourth beats, was overhauled by bebop musicians. This format was regarded as too restrictive for the free flow of melodic and harmonic ideas generated by the improvising soloist. All four beats of the measure were accented to free the soloist from the requirement of landing near the beat and freeing the music from the conventions of dance music. Bebop asserted its existence as an art form, a music designed for serious listening.[6] In a wider sense, bebop musicians were attempting to demonstrate the intellectual respectability of black music. In the verbal lexicon of bebop musicians and fans, "entertainer" was a term of derision. The musicians were artists attempting to cast aside old restrictions both musical and social.

This revolution of musical convention may also have represented a reaction against the music industry's promotion of white artists who were capitalizing on the black musical heritage. Indeed, the media image of jazz seemed to favor white artists at least through the fifties. It was Paul Whiteman, not Jelly Roll Morton or Louis Armstrong, who carried the popular title "King of Jazz" in the twenties. It was Benny Goodman, not Duke Ellington or Count Basie, who was labeled the "King of Swing" in the big band era of the thirties and forties. Stan Getz, Gerry Mulligan and, above all, Dave Brubeck garnered the lion's share of mass media attention in the fifties. Obviously, many black jazz performers, most notably Armstrong, Ellington and Basie, achieved widespread fame and great wealth. The issue that rankled black performers, however, was the greater amount of mass media attention given to white jazz artists. For the average black jazz artist, it was more difficult to gain wide exposure in comparison to white artists. Blacks also earned less than whites for their performances.[7] By creating a demanding new artistic movement, the bebop performers consciously attempted to launch jazz in a direction in which blacks would be in the forefront of media attention as well as musical innovation.

LeRoi Jones has argued that the bebop movement also represented a veiled rebellion against the confines of white society. The economic and social realities of the post-World War II black community grated against the noble rhetorical motives through which American participation in the war had been justified. In Jones' view bebop reflected a growing disenchantment among young blacks with the dream of assimilation into American culture.[8] Aspiring to the status of art, bebop expressed racial identity in positive terms. In its iconoclasm, it was a call for identification of the outcast through a symbolic separation from the mainstream of society. The writings of Jack Kerouac reveal that this call went out to whites as well as black. Kerouac, the father figure of the "beat generation," glorified bebop as the sound of freedom incarnate.

As new movements often will, bebop came under heavy critical attack. Its rhythms were deemed "nervous" and "frantic," its melodies called "nonsensical", and its performers "arrogant."[9] The critics reacted both to the demeanor of the performers and the unfamiliarity of the musical form presented by the pioneers of bebop. Despite this, the movement did begin to attract some media attention through the offices of radio personality Symphony Sid who broadcast live bebop

performances from New York nightclubs. The music was not, however, recorded by major record labels. The bebop that did find its way onto records was done on small "one owner labels" or black owned labels such as Savoy, Dial and Clef. Because of the limited resources for promotion and distribution possessed by these labels, the financial rewards for the artist were limited.[10] Many of the recordings of Charlie Parker's music that are now available were taped from the radio broadcasts and not released until after his death. Bebop, for all the influence it would have on the future direction of jazz, remained an underground phenomenon through the forties and fifties.

With the growth of the civil rights movement after the Brown vs. Board of Education decision, the rhetorical element of jazz began to flower more openly than it had in the bebop movement. In the late fifties bebop was reincarnated in a somewhat modified form known as hard bop or soul jazz. A musical extension of bebop, hard bop was tailored more to the popular music market with its accent on a hard blues backbeat and its kinship to rhythm and blues (the black roots of rock and roll). Because there was little in the way of experimentation with form in this style, it cannot strictly be considered a part of the avant-garde. This blues and gospel drenched style, however, emphasized in no uncertain terms the black origins of the music. Through its frank celebration of black culture, hard bop expressed black pride openly. Through its song titles, this jazz movement sought to "give value to terms of existence that were considered not only valueless, but shameful."[11] The word "funk" or "funky" with its earthy, sexual overtones was used extensively in song titles and in the description of the music. Black ecstatic religious styles were referred to in many tunes, both in the titles and the style of play. A number of songs appeared with African tribal and place names in the title--"Tanganyika Strut," "Santu," "Dinka Street," and "Airegin" (which is Nigeria spelled backwards the pronounciation of which suggests origin). Though not primarily an experimental form of music, hard bop placed a heavy emphasis on black identity. As was the case with bebop, the bulk of recordings of this music was done on small jazz oriented labels such as Prestige, Riverside and Blue Note.

With the more open racial atmosphere of the fifties, some artists attempted to be more open with their rhetorical appeals. This overt rhetoricalization of the music, however, met with resistance. In 1958 Sonny Rollins recorded an album entitled Freedom Suite for Riverside. In the liner notes he dedicated that piece to the black struggle for freedom. To their credit, Riverside released the album. It was quickly pulled off the market, however, and re-released with new liner notes stressing that Rollins meant freedom in general. As a further precaution, the album was given the title of another song in the collection, The Shadow Waltz, to purge completely any hint of rhetorical intent.[12] Since record companies generally retain control over album artwork and packaging, there was nothing that Rollins could do.

The true avant-garde of the late fifties and early sixties was expressed in the music of the free jazz movement. It was around this movement, too, that allegations of racially based suppression of expression swirled through the militant atmosphere of the sixties. Musically, this jazz style proclaimed liberation from the white world through its rejection of European musical convention. The controlling role of harmony, that accounts for the richness of Western music despite its use of only two scales, was minimized. Non-Western pentatonic scales and tonal centers formed the basis for much of this music instead of European chord structures. Ironically, this trend had been evident in modern European concert music for decades. Stravinsky, Varese and Schoenberg were influences on free jazz performers. African polyrhythms and melodic polyphony came into wide use. The free jazz artists consciously experimented with these forms in the same "art music" spirit as the bebop artists of the forties. In this respect, the free jazz movement was the true descendant of the bebop movement.

In this experimentation there was an implicit refusal to play the "white man's way" in order to emphasize pride in black culture through a conscious process of symbolic separation. The free jazz movement "re-Africanized" jazz in a much deeper sense than had the bebop school. Its rhythmic and melodic models were consciously drawn from third world sources to emphasize the quest for identity outside of the framework of white American culture.[13] The development of this music paralleled the development of black rhetorical themes of the sixties, the nationalism and separatism expressed in the writings and addresses of Malcom X, Stokely Carmichael and the Black Panther Party. The jazz avant-garde discarded Western musical forms in the same way that the black radicals discarded the myth of cultural assimilation.

It is ironic, then, that the free jazz movement received more attention from major record labels than any previous segment of the avant-garde. Atlantic records and ABC were by far the leaders among major labels in the amount of free jazz material marketed. ABC, in particular, recorded almost all the major free jazz performers--John Coltrane, Archie Shepp, Cecil Taylor, Pharoah Sanders and Albert Ayler were among those who contributed to this output. Impulse records, the jazz division of ABC, became a haven for avant-garde artists. Despite this attention from major labels, charges of racism continued to be leveled at the industry. LeRoi Jones held that the confinement of jazz to the Impulse division of ABC constituted a form of segregation, being the same in spirit as the old "race records" system whereby recordings by black blues and jazz artists were sold exclusively in black communities.[14] Trumpeter and jazz educator Donald Byrd has charged that ABC never seriously intended to promote and market the music. Rather, they intended to take an intentional loss for tax purposes.[15] In the heated rhetorical atmosphere of the sixties, free jazz performers attributed their lack of popular following to such racism in media institutions which blocked the flow of free artistic and rhetorical expression. In a controversial and widely quoted comment outspoken saxophonist Archie Shepp offered a Marxist, as well as racial, interpretation of the problem:

> Jazz is the product of the whites--the ofays--too often my enemy. It is the progeny of the blacks--my kinsmen. By this I mean, you own the music and we make it....That's what the avant-garde is all about. We're not simply angry young men--we are enraged, and I think its damn well time.[16]

In this view the business relationships in the music industry were placed in a stark master-slave perspective. While surely a product of its late sixties context, this statement captured the frustration felt by many free jazz musicians.

In the cooler atmosphere of the seventies, little has changed with respect to avant-garde music. Charges of racism are still hurled at the music industry, albeit, in more subdued tones.[17] Most avant-garde artists still record on small independent or foreign labels. There has also been a movement toward establishing artist owned labels such as AECO, Strata-East and Watt 1. Richard Abrams, founder of the Association for the Advancement of Creative Musicians, summed up the attitudinal context of these artist owned labels when he stated: "We found that the only way to create mutual respect between artists and tradesmen was for us to become both the artists and tradesmen."[18] As in earlier eras, the artists suffer economically from the limited promotion and distribution that these labels can supply. The corporate music industry's failure to represent adequately the avant-garde remains a burning concern among many jazz artists. There is, however, much more than institutional racism to be considered as a factor in this case. A major contributor to the problem of limitation of expression is the economic structure of the music industry.

II

As a business venture in a profit conscious society, the music industry exists primarily to reap an economic reward for its investment and will, obviously,

be most interested in music that has a good chance of fulfilling that goal. The method of reaching that end is the issue that raises ire in the jazz community. Norman Granz, owner of Pablo records, remarked that the corporate music industry's obsession with big hits and large profits has been a major cause of the neglect of jazz. Traditionally, jazz albums sell a small (ten-twenty thousand) number of records but, according to Granz, a substantial profit can be realized by selling a small volume of a large number of releases.[20] The major record labels, however, have abandoned that approach in recent years. The problem seems to be one of conformity in an extremely competitive business. In the seventies these major labels revised their marketing strategies away from a "hit or miss" approach to seeking the elusive million seller. A smaller variety of proven sellers are marketed and fewer chances are taken on something different. Promotion is heaped on this relatively small number of "surefire winners" and radio stations are bombarded with these chosen few, avoiding the peril of "throwing a lot of product against the wall of see what sticks."[21] This cautious and concentrated market philosophy leaves the experimentalist as "odd man out." Since the industry's touchstones are popularity and profit rather than artistic or cultural values, the arguments of those castigating the industry for its racial or ideological bias against the avant-garde are diluted. The perspectives maintained by artists and businessmen are radically different.

In the cautious market philosophy followed by the major record companies, trends tend to be followed closely.[22] Even success, however, can be ignored. Archie Shepp, who is now on the faculty of the University of Massachusetts, recently suggested that the record industry actively discouraged music made in the avant-garde mold. Referring to one of the few "hits" produced by the avant-garde, Shepp stated:

> Did you know that A Love Supreme (a 1964 release by John Coltrane) was a gold record? And yet it never stood as a model in the studios in the way other types of music have, like Superstitution (by Stevie Wonder). If that hits, everybody in town is told to make a record like that. How come it didn't happen like that with A Love Supreme? That was a gold seller but people are discouraged from making records like that.[23]

Shepp suggested that by failing to follow up on Coltrane's lead, the industry purposely stifled the avant-gard's chance to win a popular audience. ABC-Impulse, however, attempted to do exactly that by recording avant-garde artists through the sixties. The question of whether ABC seriously attempted to promote those records or sat back to take a tax loss, as Donald Byrd charged, will have to await a detailed analysis of ABC's promotional campaign for the Impulse division. Although Shepp's analysis raises some interesting questions about the record industry's role in popular taste-making, it ignores a vital factor necessary for a complete picture of the issue--the relationship of the jazz avant-garde to the mass audience.

III

The avant-garde itself set limiting conditions inhibiting its ability to reach a mass audience. Since the bebop movement of the forties, the struggle to establish jazz as a legitimate art music has resulted in a paradox. On the one hand is the desire for appreciation and success and, on the other hand, a repugnance for what that means in terms of audience adaptation. William Cameron, in his sociological studies of bebop artists, labelled the tension between these two horns of the dilemma a "controlled schizophrenia."[24] European jazz commentator Andre Hodier wrote:

> The history of jazz and jazzmen is that of creative purity gradually corruped by success. In his youth, a great jazz musician has to struggle to impose his art; if he succeeds in doing so, he must then struggle daily against his own success.[25]

The vision of the struggling artist battling the base forces of commercialism and mass taste runs rampant through the avant-garde. In this central myth exists the seeds of an agonistic relationship between artist and audience, sometimes leading to hostility toward audiences beyond a small cult following. Howard Becker, a musician as well as a sociologist, noted the tendency of bebop jazz performers to regard their talent as a unique gift that only a sophisticated audience could understand.[26] The mass audience, then, are viewed as agents of corruption tempting the artist to forsake the purity of art and pollute his gifts in the service of commercial pandering. The consistency of occurrance of this theme can be illustrated by juxtaposing statements from two quite different sources. First, bebop pianist Thelonious Monk:

> Play your own way. Don't play what the public wants. You play what you want and let the public pick up on what you are doing, even if it does take them fifteen or twenty years.[27]

Compare that advice with the following comments by jazz-rock guitarist Frank Zappa:

> I figure that a person buying my record is interested in what I am doing... and I do him a favor by doing what I feel like doing because then he hears who I am at that moment in time. If they like it, fine. If they don't, they can go out and buy another record.[28]

Each of the above remarks expresses an unwillingness to sacrifice artistic purity for the siren call of popular appeal. The music is viewed as an honest expression of self which cannot be altered for the sake of audience comfort. The audience must adapt to the artist or listen to something else. Indeed, Thelonious Monk, though one of the innovators of the bebop movement, was so idiosyncratic that he had a difficult time finding acceptance even with the progressive, rebellious bebop audience. It was not until the late fifties that he gained wide recognition in the jazz community.

In the sixties Robert Stebbins reported a number of attitudinal changes among jazz musicians. Among his findings, he reported that young jazz musicians were far less likely than those of the forties and fifties to hold negative feelings toward their audiences or society in general with one notable exception-avant-garde artists. These musicians remained the true descendants of the bebop artists. Stebbins noted that their music was highly experimental and "as soon as their innovations became at all accepted, they were promptly disowned by their instigators."[29] In view of this value system which prizes idiosyncracy and change, is it likely that avant-garde artists would want to use John Coltrane's A Love Supreme as a recording model, as Archie Shepp suggested above? It would seem to run against the grain of the avant-garde value system.

It can be said that the avant-garde lost touch with its audience by refusing to adapt its communication. The paradox is that this is a part of the ideology behind this style of music. The avant-garde has always concerned itself with self-conscious creation and individual expression. By demanding a great degree of sophistication from listeners, the avant-garde constantly upsets its potential to attract new listeners in a mass audience. This is especially true when combined with the cautious marketing strategies employed by major record companies who have the power, when they choose to use it, to

give an artist a chance to reach a vast public. Major record companies demand control over the content of the musical output of their artists unless they are proven sellers.[30] Clearly, this condition is unacceptable to an artist who holds the avant-garde value system and does not wish to be labeled a "sell out" in the eyes of his peers.

IV

The issues involved in this case of the inhibition of expression are much more complex than those writers who charge racism acknowledge. The very different perspectives maintained by those who make the music and those who market it contribute significantly to the problem. From the industry's point of view, experimental music, especially when tinged with rhetorical overtones, is rarely a popular item. At least with "message rock" of the sixties, the mass audience could ignore the words and dance to the music. The tonal clusters, pentatonic scales and complex polyrhythms of avant-garde jazz would require a re-education in dance for the average listener. The rebellious aesthetic stance, aside from the radical rhetorical posture, created its own limitations by abandoning musical conventions familiar to the ears of the great majority of listeners. Even though the charge of racism cannot be entirely ruled out (especially in the earlier history of jazz through the fifties), it is only one of a number of factors contributing to the problem.

One final point needs to be made. Because this essay has pointed to the independence of the avant-garde from audience demands, it should not be inferred that this is a call for these artists to abandon their artistic demands. Avant-garde jazz is a vital part of black artistic expression and it may well be that the "controlled schizophrenia," that tension between artist and audience mentioned above, is necessary for the artistic fruition of this musical style. On the other hand, heavy media emphasis on the marketability of music at the expense of artistic originality may ultimately destroy the economic base of the avant-garde. This impasse between the psychology of the marketplace and the artistic vision defines a good portion of the conflict. The wider problem of the cultural relationships between majority and minority segments of American society, however, cannot be ignored.

Endnotes

[1]The seventies have seen a number of books both scholarly and popular exploring this theme. Among them are: Edward Epsein, News From Nowhere,(NY: Random House, 1973). David Altheide, Creating Reality, (LA:Sage, 1976). Edith Efron, The News Twisters, (LA: Nash, 1971). Bernard Roshcoe, Newsmaking, (Chicago: University of Chicago, 1973).

[2]LeRoi Jones, Blues People, (NY: Morrow, 1963). LeRoi Jones, Black Music, (NY: Morrow, 1969). A.B. Spellman, Four Lives in the Bebop Business, (NY: Pantheon, 1966). Barry McRae, Jazz Cataclysm, (NY: Barnes, 1967). Frank Kofsky, Black Nationalism and the Revolution in Music, (NY: Pathfinder 1971). Ben Sidran, Black Talk, (NY: Holt, Rinehart and Winston, 1971).

[3]Leroy Ostransky, Understanding Jazz, (NY: Prentice-Hall, 1977), p. 28-29.

[4]Sidran, p. 68.

[5]Lloyd Miller and James Skipper, "Black Protest in Avant-garde Jazz," in The Sounds of Social Change, ed. R. Serge Denisoff and Richard Peterson, (NY: Rand, McNally, 1972) p. 32.

[6]John Mehegan, "The ABC's of New Jazz," Saturday Review, 39 (November 10, 1956) p. 34.

[7]James Collier, The Making of Jazz, (Boston: Houghton, Mifflin, 1978) p. 185.

[8]Jones, Blues People, p. 185-189.

[9]Jones, Black Music, p. 18-19.

[10]It is ironic that as those small labels went out of business, their stock was purchased by major record labels and many of these recordings are now available on Columbia, Warner Bros. and MGM.

[11]Jones, Blues People, p. 219.

[12]Kofsky, p. 50-51.

[13]Clifford Taylor, "The Design of Culture," Encounter, 31 (November, 1968) p. 41-48.

[14]Jones, Blues People, p. 99.

[15]Donald Byrd, "Music Without Aesthetics," Black Scholar, 9 (July, 1978) p. 2-5.

[16]Nat Hentoff, "The New Jazz - Black, Angry and Hard to Understand," New York Times Magazine, December 25, 1966, p.10.

[17]See the account of a recent Association of Recording Artist's meeting in "Potpourri," Downbeat, January 25, 1979, p.9.

[18]Richard Abrams, David Baker and Charles Ellison, "The Social Role of Jazz," in D.R. DeLerma, ed., Reflections on Afro-American Music, (Kent, Ohio: Kent St. Univ. Press, 1973) p.105.

[19]Many interviews in popular jazz journals attest to this concern. Gary Giddens, "Muhal Richard Abrams and the AACM," Radio Free Jazz, June, 1978, p.7-9. W.A. Brower, "Sam Rivers: Warlord of the Lofts," Downbeat, November 16, 1978, p. 21. Bret Primak, "Leroy Jenkins: Gut Plucking Revolutionary," Downbeat, November 16, 1978, p.23. Bret Primak, "Archie Shepp: Radical with Tenure," Downbeat, December 21, 1978, p. 27. Bob Henschen, "Anthony Braxton," Downbeat, February 22, 1979, p. 18.

[20]Ira Gitler, "Norman Granz," Radio Free Jazz, November, 1978, p.10-11.

[21]"The Record Industry Sounds a Note of Joy," Business Week, December 1, 1975, p.53-54.

[22]Byrd, p.3.

[23]Bret Primak, "Archie Shepp," p. 59-60.

[24]William Cameron, "Sociological Notes on the Jam Session," Social Forces, 33 (Spring, 1954) p. 182.

[25]Andre Hodier, Toward Jazz, (NY: Evergreen, 1962) p. 19.

[26]Howard Becker, "The Professional Jazz Musician and His Audience," in Denisoff and Peterson, p.248-260.

[27]Nat Hentoff, Jazz Is, (NY: Random House, 1976) p.129.

[28]Tim Schneckloth, "Garni du Jour, Lizard King and Slime," Downbeat, May 18, 1978, p. 16.

[29]Robert Stebbins, "Social Change and the Jazz Musician," Social Forces, 46(September, 1967) p.41.

[30]Sidney Shemel and William Krasilovsky, This Business of Music, (NY: Billboard Publications, 1977) p.6.

THE SUPREME COURT AND THE FIRST AMENDMENT: 1978-1979

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I. The Not So Free Press

There is a new law in the land: "When a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to the plaintiff's reputation, there is no privilege under the First Amendment's guarantees of freedom of speech and press which bar the plaintiff from inquiring into the editorial processes of those responsible for the publication where the inquiry will produce evidence material to the proof of a critical element of the plaintiff's cause of action." (Herbert v. Lando, 47 LW 4401, 1979).* This position, the result of a 6-3 United States Supreme Court decision, was predictable and likely will not be altered as long as the present membership of the Court remains unchanged.

Herbert v. Lando was predictable because it was but another in a series of setbacks to media freedoms which transpired over recent months. During this brief time span the Supreme Court:

a. refused to review a Florida supreme court ruling upholding a state law making it a criminal offense to film or record conversation without the prior consent of all persons involved. (Sunbeam TV Corp. v. Shevin, 46 LW 3557, 1978).

b. refused to review a California court of appeals order to a lower court to proceed with a damage suit against NBC-TV by parents of a child who allegedly had been raped in imitation of an act viewed on a TV dramatic show. (National Broadcasting, Inc. v. Niemi, 46 LW 3634, 1978).

c. let stand a New Mexico court order directing reporters to divulge confidential sources in a libel suit. (Hubbard Broadcasting, Inc. v. Ammerman, 46 LW 3700, 1978).

d. ruled that neither the First nor the Fourth Amendments are violated by police who rummage through press room files while armed only with a search warrant. (Zurcher v. Stanford Daily, 346 U.S. 547, 1978).

e. while supporting the FCC's authority to order divestiture of "egregious" newspaper broadcast combinations, again asserted the "fundamental proposition that there is no unabridgable First Amendment right of every individual to speak, write or publish." (FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 1978).

f. reversed rulings by California courts that journalists should be allowed to inspect a prison on "unreasonable times," and affirmed that journalists enjoy no more access rights to jails than those granted to the general public. (Houchins v. KQED, 438 U.S. 1, 1978).

*Official U.S. case citations for the 1978-1979 Supreme Court term do not appear in this article because they are not assigned until a time subsequent to the preparation of this material.

g. held that broadcasting can be held to more restrictive standards than other forms of communication because of "its pervasiveness and accessibility to children." (FCC v. Pacifica Foundation, 438 U.S. 726, 1978).

h. denied review of a Texas court ruling that a cameraman has no First Amendment right to film an execution. (Garrett v. Estelle, 556 F. 2d 1274, 46 LW 3483, 1978).

i. let stand the conviction of the New York Times and reporter Myron Farber for contempt of court by refusing to disclose confidentially obtained material. (New York Times v. New Jersey, 47 LW 3355, 1978).

j. refused to review a contempt conviction of a reporter who alleged a "good faith" reliance on the constitutional privilege to protect his source during the trial of Milda Sandstrom for the murder of her husband, a chief executive of a group of broadcast stations. (Pennington v. Kansas, 581 P2d 812, 47 LW 3440, 1979).

k. declined to review a lower court ruling that disclosure of telephone records by telephone companies to government officials is not in violation of the First Amendment. (Reporters Committee for Freedom of the Press v. AT&T, 47 LW 3468, 1979).

l. gave trial judges broad freedom to bar the press from their courtrooms when a defendant contends that publicity might interfere with his right to a fair trial. (Gannett v. De Pasquale, 47 LW 4902, 1979).

Although there are conflicting rights involved in each of these twelve cases, the fact that all were decided against the press is not only ominous but consistent with the attitude of Chief Justice Burger toward the media. Burger, it should be remembered, was a swing vote in Bellotti v. First National Bank of Boston, 435 U.S. 765, 1978, when he supported banking associations which use corporate funds for the purpose of publicizing their views opposing a tax referendum. However, in this case, otherwise void of media mention, Burger in a concurring opinion qualified any support of unbridled expression by refusing to restrain banks in the expression of their views "if we are not going to similarly restrain the vastly more influential media." Burger gratuitously concluded that if the press is to be free with no special privilege, other corporations should be equally free because the liberty of the press must be no greater and no less than the liberty of every citizen. Apparently Burger would have supported state restraint on corporate expression if he were not compelled to sacrifice this for the opportunity to enunciate the threat of media freedom.

While both the Zurcher case, which endorsed the use of a search warrant rather than a subpoena for obtaining matter from a newsroom, and the Farber case, which punished non disclosure of confidential information despite a shield law, were widely publicized and received with great apprehension, Herbert v. Lando portends even greater and more serious consequences but not without some possible benefit to the press.

Colonel Herbert attracted national attention in 1970 when he charged superior officers with covering up war crimes. CBS producer Barry Lando's media coverage questioned the truth of the charges. Because Herbert was a "public figure," he was obligated under New York Times v. Sullivan, 376 U.S. 254, 1964, to prove in order to recover for libel that Lando published a damaging falsehood with knowledge that it was false or with reckless disregard for whether it was false or not. Lando refused under the First Amendment to answer questions which he felt probed the reasons for his editorial decisions and called for conclusions about his intentions.

Although Judge Laufman of the Second Circuit U.S. Court of Appeals held that forcing reporters to reveal their thoughts would "strike to the heart of the vital human component on the editorial process," the Supreme Court disagreed. Justice White wrote in the majority opinion that New York Times and subsequent cases "made it essential to proving liability that plaintiffs focus on the conduct and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect his publication is false. In other cases proof of some kind of fault, negligence perhaps, is essential to recover. Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination." The Supreme Court lacked the slightest inclination toward granting a media defendant an absolute privilege thus completely foreclosing liability when the media is faced with a defamation charge from anyone. Thus the Court could either throw out the New York Times v. Sullivan "actual malice" proof requirement, a journalist's best defense, or lessen the impossible burden on the plaintiff by enabling demonstration of a journalist's knowledge of falsity or reckless disregard for truth through forced disclosure of the defendant's beliefs, intentions, and conclusions. The Court chose to ease the plaintiff's burden when attempting to prove "actual malice" rather than drop the "actual malice" requirement altogether and restore simple negligence as the standard for a journalist's liability. Thus free expression, through journalism which was never absolutely privileged, has lost ground but the loss could have been far greater.

Media spokesmen were quick to respond that the Herbert decision will result in public issues either being too carefully treated or even avoided by journalists fearful of the ease with which they can be held accountable for their statements. However, the opinion made it clear that the Court majority took note of and was unimpressed by the argument that forcing reporters to divulge their thoughts would have a chilling effect on the editorial process. As Justice White concluded, "If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate and does not abridge either freedom of speech or the press."

Media representatives are understandably disappointed and forced to be vigilant about possible abuses resulting from the Herbert decision. Their dismay, however, is not likely to be assuaged soon. Until the mid-1970's the Court, stacked with Nixon appointees, functioned more conservatively than the previous Warren Court as the coalition frequently voted together. Now the Nixon appointees (Burger, Blackmun, Powell, and Rehnquist) are voting together a little over one third of the time. Only four of the justices, two liberal holdovers--Brennan and Marshall and two conservatives--Burger and Rehnquist, demonstrate consistent philosophical positions. Generally the other five justices show no predictable ideological pattern as they take cases one at a time without announced commitment to larger philosophical considerations. However, when they take up First Amendment cases involving the press, full protection of free and uninhibited expression has recently been the loser, one case at a time. This loss was accentuated even further on July 2, 1979, when the Court in its last breath of the recent session apparently ruled that the public has no constitutional right under the public trial guarantee of the Sixth Amendment to attend criminal trials.

In the case of Gannett v. De Pasquale, 47 LW 4902, 1979, the Court outdid even the Herbert decision and dealt the press its severest setback in the growing string of adverse rulings. Here defense lawyers during a pretrial hearing in a murder case argued that adverse publicity would jeopardize their client's chance for a fair trial, and without objection from the prosecution the judge cleared the courtroom. The judge, who saw a "reasonable probability of prejudice" resulting from publicity about a confession and alleged murder weapon, rejected a news reporter's claimed right to witness a public trial

through "right of access" guaranteed under the First and Sixth Amendments. Justice Steward, writing for the majority, acknowledged the "strong societal interest" in open trials but announced that any public or press right of access had to yield to the guarantee of a fair trial to a defendant. Stewart refused to endorse any press or public right under the First Amendment to attend criminal trials. Justice Powell favored public awareness of what goes on in the courts by granting reporters a First Amendment "interest" in attending criminal proceedings, but this right has to be balanced against the kind of unfair publicity which would probably have resulted in this case. Justice Rehnquist, who also concurred, wrote in a separate opinion that the First Amendment is not "some kind of constitutional sunshine law," the public has no right to attend criminal proceedings, and a trial court has no obligation whatsoever to justify closing a pretrial hearing. That openness in court proceedings may improve the quality of testimony, that unknown witnesses may be induced to come forward with relevant testimony, that judges, lawyers, and jurors may perform their duties more responsibly, and that the trial system can be held accountable to the public and above the secrecy which breeds abuse failed to influence Rehnquist's protection for a closed proceeding.

Justice Blackmun in a lengthy dissent to the Gannett case regretted that the decision pays little heed to "the important interests of the public and the press (as part of that public) in open judicial proceedings." The fear that preservation of these interests cannot be entrusted to judges, prosecutors, and defendants led Blackmun to favor closed hearings only if in fact the closing would keep prejudicial information from the public.

The process of news gathering, as evidence in the Gannett case, has received considerably less First Amendment protection from the Supreme Court than the dissemination of news once it is gathered. The Court has been quite protective of competing individual rights such as to a fair trial, to reputation protection, and to privacy when balanced out against access to information and free expression. Consequently the Court's record concerning the First Amendment and free speech has been mixed. It has endorsed searching newspaper offices and closing court proceedings to the public while at the same time the Court has prevented suppression of government documents, invalidated court orders prohibiting the publication of information about a murder trial, overturned conviction of a newspaper for publishing the name of a juvenile contrary to state law, and reversed laws prohibiting lawyers from advertising. Overall the Court's decisions reflect no clear and decisive directions and neither irreparably damage the First Amendment nor render it much better off. With Rehnquist and Burger on the right and Marshall and Brennan on the left First Amendment decisions in the year ahead hinge on the "fluid" middle of five justices who will continue to react, one case at a time.

Other First Amendment opinions handed down by the Supreme Court during the 1978-1979 term resulted in rulings that:

1. the constitutional grant of legal immunity lapses anytime a lawmaker publishes a libelous statement outside Congress (Hutchinson v. Proxmire).

2. a public employee is protected by the First Amendment when he is dismissed for what he communicates in private to his employer (Girhan v. Western Line School District).

3. a libel defendant must show more than mere newsworthiness to have an allegedly defamed person declared to be a public figure and thus burdened by having to show the defendant acted with actual malice (Wolston v. Reader's Digest Association).

4. a newspaper which lawfully obtains truthful information about a matter of public significance cannot be punished under the constitution for publishing the information unless the highest form of state interest can be shown (Robert K. Smith v. Daily Mail Publishing Co.).

II. Opinions Rendered

Hutchinson v. Proxmire (47 LW 4827)

A press release and news article generated by Senator William Proxmire's "Golden Fleece of the Month" award were regarded by a lower court to be legitimate legislative activites and thus protected from libel action by a research scientist who alleged that the Speech or Debate Clause (Art.I, sect. 8, Constitution) did not grant Proxmire absolute immunity to impugn him and his work. The court also found that the scientist who did not voluntarily thrust himself into the vortex of any public controversy was, nevertheless, a public figure who had to show Proxmire's actual malice in order to recover. The Court of Appeals affirmed and the Supreme Court reversed in an 8-1 decision.

The Supreme Court held that the Speech or Debate Clause does not protect members of Congress who transmit statements by press releases and newsletters. The republication of defamatory statements initially made in the chamber does not carry with it the original immunity from prosecution since neither the newsletter nor the press release was essential to the deliberative purposes of the Senate. In contrast to voting and preparing committee reports, newsletters and press releases inform others about legislative activity and represent no more than the will of a single member of the legislative body.

Hutchinson was not a public figure who had to prove actual malice since his public nature came "after the alleged libel and was limited to responding to the announcement of the award." Chief Justice Burger concluded for the Court that "those charged with alleged defamation cannot by their own conduct create their own defense by making the claimant a public figure" and thus burdened beyond likely ability to prove his case.

Bessie B. Girhan v. Western Line Consolidated School District, et al. (47 LW 4102)

Bessie Girhan claimed that her dismissal as a school teacher infringed her right of free speech under the First Amendment. The School District alleged that Girhan was dismissed for her criticism of the District's practices and policies which she claimed were racially discriminatory. The District further contended that Girhan "made petty and unreasonable demands" when communicating to the principal in a manner which he described as "insulting," "hostile," "loud," and "arrogant."

The District Court ordered Girhan reinstated because her dismissal violated her First Amendment rights. The Court of Appeals reversed because Girhan's complaints and opinions were not protected since they were expressed privately to the principal, and there is no constitutional right to "press even 'good' ideas on an unwilling recipient."

Justice Rehnquist writing for a unanimous Court vacated the appellate court judgment because he was unable to agree that private expression is beyond constitutional protection. There is nothing, Rehnquist contended, in the First Amendment or Supreme Court findings "to indicate that freedom to communicate is lost to a public employee who communicates privately with her employer rather than to spread her views before the public." Rehnquist concluded that the "unwilling recipient" argument did not apply since the principal "having opened his office door to Girhan, was hardly in a position to argue that he was the 'unwilling recipient' of her views."

Wolston v. Reader's Digest Association (47 LW 4840)

Wolston sued the author and publisher of a book entitled KGB, The Secret Work of Soviet Agents alleging that passages therein stating that he had been indicted for espionage and had been a Soviet agent were false and defamatory. The District Court granted summary judgment for the defendant because Wolston was a public figure and the First Amendment precluded his recovery unless he could prove that the defendant published with knowledge of the falsity or reckless disregard for whether it was false or not.

In an opinion delivered by Justice Rehnquist the Supreme Court was unable to find that Wolston was a public figure, and thus he was not required to prove actual malice in order to recover. Wolston was not one who "thrust himself to the forefront of particular public controversies in order to influence the resolution of the issues involved." His failure to appear before the grand jury was not calculated to attract public attention to himself, invite public response, or effect any issue of public concern. Rehnquist concluded that involvement in criminal conduct does not automatically make one a public figure "for purposes of comment on a limited range of issues relating to his conviction." Any other result Rehnquist felt would create an "open season" for any who desired to defame persons convicted of a crime.

Justice Brennan dissented because in his judgment Wolston was a public figure for the limited purpose of comment on his involvement with espionage, a legitimate topic of current debate related to national security.

Robert K. Smith v. Daily Mail Publishing Co. (47 LW 4824)

By monitoring a police radio frequency and asking eye witnesses the Daily Mail learned and subsequently published the name of a juvenile arrested for allegedly killing another youth. The newspaper and others were indicted for violating a state statute making it a crime to publish, without juvenile court approval, the name of any youth charged as a juvenile offender.

The Supreme Court affirmed a lower court ruling that the statute on which the indictment was based violated the First Amendment. Chief Justice Burger for a unanimous court held that punishment of publication after an event requires "the highest form of state interest to sustain its validity." Here First Amendment rights must prevail over the lesser interest in protecting juveniles. However, even if the statute did serve a state interest of the highest order, the statute could not have achieved this goal since it does not restrict any other form of publication except by newspapers.

III. Docketed: Other Cases Disposed

The Supreme Court took action that in each of the following cases resulted in allowing the holding of the lower court to prevail except for one in which the judgment was vacated.

Business Regulation

Issue: Does a municipal ordinance controlling the access to and quality and location of newsracks violate First Amendment speech and press rights? The lower court held no even though general circulation papers received more favored treatment than others. (Certiorari denied. Socialist Labor v. City of Glendale, 47 LW 3562).

Ruling below: The FTC has the power to bar advertisements of trade associations which misrepresent the state of scientific evidence; but, except

in limited First Amendment circumstances, the FTC may not require corrective affirmative disclosure in future advertisements. Issue: Were the First Amendment rights of the association abridged by failing to specify what speech may be uttered without an aditional mandated statement? (Certiorari denied. National Commission on Egg Nutrition v. FTC, 570 F2d 157, 47 LW 3062).

Ruling below: A city council which denied a permit to an adult bookstore because local residents objected to the window displays violated the First Amendment. Issue: Through its police power may a municipality use license denial to prohibit conduct of a business involved in obscene materials without meeting censorship standards as set forth in Freedman v. Maryland, 380 U.S. 51? (Certiorari denied. Watts v. Bayou Landing, Ltd., 563 F2d 1172, 47 LW 3057)

Issue: Does a municipal ordinance that conditions issuance of a license to operate adult establishments on the absence of any conviction for a "misdemeanor or felony related to sex, alcohol, drugs, gambling or related matters" violate the First Amendment because it conditions expressions of speech? Does such an ordinance violate the constitution by denying applicants the right to work and engage in free speech activity? (Certiorari denied. Gateway Books, Inc. v. Jackson, 47 LW 3721).

Issue: Does the Seattle Adult Movie Theatres Zoning Ordinance deny equal protection because adult movie theatres are zoned into clusters while adult bookstores, peep shows, drive-in movies, and other adult entertainment establishments are not similarly zoned? Is such an ordinance too vague because it defines "adult theatre" based on press material rather than a film which is judged in terms of the First Amendment? (Certiorari denied. Apple Theatre, Inc. v. City of Seattle, 47 LW 3690).

Government

Issue: Is the American Chemical Society a federal instrumentality and thus liable as such for "conduct unduly restrictive of freedom of speech"? (Certiorari denied. Yiamouyiannis v. Chemical Abstracts Service, 47 LW 3372)

Advertising

Issue: The federal Food, Drug and Cosmetic Act regulating the advertising of restricted devices does not include hearing aids and thus does not preclude state regulation. Does an injunction, issued pursuant to a California statute, prohibiting a hearing aid manufacturer from making product claims about the effect on hearing loss violate the manufacturer's First Amendment rights? (Appeal dismissed. (Kievlan v. Dahlberg Electronics, Inc., 47 LW 3358.

Ruling below: A nonprofit veterinary medical corporation was prohibited from advertising its services and fees. Issue: Does the prohibition violate First Amendment rights? (Judgment vacated. Society for the Welfare of Animals Incorporated v. Walrath, 47 LW 3019).

Prisons

Ruling below: Although a prisoner who prepares writs for fellow inmates may claim a First Amendment right to association, prison administrators may still ban such activity in the interest of prison administration. Issue: Is "jailhouse lawyering" a protected associational right? (Certiorari denied. Hudkins v. Buise, 584 F2d 223, 47 LW 3533).

Public Employees

Ruling below: Since government officials within the scope of their duties may make privileged utterances, allegedly defamatory statements made by

a government employee to an EEO investigator during EEO action are thereby protected. Issues: Does the intentional violation of the Privacy Act of 1974 by a federal employee communicating to a non federal employee remove any immunity from civil liability? (Certiorari denied. Harper v. Feldman, 47 LW 3180).

Issue: Does Elrod v. Burns (427 U.S. 347, 1976) which holds that the First Amendment prohibits political considerations in the case of nonpolicy-making employees but not in the case of policymaking employees apply in an employment discrimination case (where a mayor chose one fire chief over another) involving persons and positions protected by a civil service system? (Certiorari denied. Di Firo v. Taft, 47 LW 3535).

Armed Forces

Issue: Is a Navy regulation requiring military personnel to obtain permission before circulating on Navy ships a petition, invalid under existing federal law, which prohibits interfering with servicemen who desire to communicate with a member of Congress? The lower court protected the right to petition and the Supreme Court declined review. (Certiorari denied. Brown v. Allen, 583 F2d 438, 47 LW 3604).

Labor

Ruling below: A state court retains jurisdiction, despite federal law or NLRB declarations, over a union's defamation suit against an employer who inferred the union's connection with organized crime. NLRB had declared the employer's expression to be protected. Issue: Does the NLRB declaration of protected expression preclude the defamation action? (Certiorari denied. Anaheim Operating, Inc. v. Hotel and Restaurant Employees Local 681, 47 LW 3535).

Journalists

Ruling below: The trial court properly ordered a newsman to reveal the identity of a source who reported an alleged threat on a victim's life. Issues: Is a TV news reporter privileged to protect his source from disclosure when he revealed the content of the source's statement, when the identity is immaterial to the defendant's guilt or innocence, and when the defendant relied on a defense of insanity and made no other effort to discover the source's identity? (Certiorari denied. Pennington v. Kansas, 581 P2d, 47 LW 3440).

Ruling below: The inspection by law enforcement officials of journalists' telephone call records obtained from the telephone company without permission from or notice to the journalists does not violate First Amendment rights. The "First Amendment newsgathering right is subject o those general and incidental burdens that arise from good faith enforcement of valid civil and criminal laws." Issue: Is a journalist exercising a First Amendment right entitled to notice that third-party business records are being subpoened thus enabling judicial review of the subpoenas upon request of the journalists? (Certiorari denied. Reporters Committee for Freedom of the Press v. AT&T, 47 LW 3468).

Defamation

Ruling below: A theft victim who displayed photgraphs of the plaintiff taken in the act of theft and captioned with plaintiff's guilty pleas was held to be actionable invasion of privacy. The victim lost First Amendment protection when his motives became punishment and harassment. Issues: Does the First Amendment guarantee the right to speak truthfully about a public person and a public event which is a matter of public record? Is a convicted criminal a private person? Does a private person (the victim) enjoy the same speech and press protection accorded the media? Can a right

to privacy, not specifically guaranteed by the Constitution or sanctioned by state law, be enforced when it infringes on First Amendment guarantees? (Certiorari denied. King v. Norris, 47 L.W. 3181).

Ruling below: The appellate court on First Amendment grounds reversed a verdict for an unsuccessful political candidate who claimed that a union published false information about him. Issue: Was the candidate properly denied redress for libel? (Certiorari denied. Reichel v. United Steel Workers, District 27, 47 LW 3181).

Ruling below: A public official libel plaintiff was unable to show "actual malice" and thus could not recover against a newspaper which alleged the plaintiff was unfit for office because of ineptness, incompetence, and indecisiveness. The court found the allegations matters of opinion, not fact, and the proper subject of comment although slanted, mean, vicious, and irresponsible journalism. Issue: Was the reversal on appeal of a verdict for the plaintiff a misapplication of the malice standard enunciated in New York Times v. Sullivan? (Certiorari denied. Early v. Palm Beach Newspapers Inc., 47 LW 3097).

Issue: When a lower court applies First Amendment guidelines to dismiss summarily a defamation case, does this deprive the plaintiff of due process under the Fourteenth Amendment? (Certiorari denied. Sims v. KIRO, Inc., 47 LW 3734).

Obscenity

Ruling below: The seizure of other personal property in the course of executing warrants for the seizure of allegedly obscene films from adult bookstores, although improper, does not totally restrain First Amendment rights, does not void the entire search, and does not cause forfeiture of all the evidence seized in the search? Issue: Does seizure of property beyond the authority of the warrant infringe First Amendment rights? (Certiorari denied. Hobbs v. Illinois, 47 LW 3523).

Issue: Does California law conflict with First Amendment rights when it imposes obligations on those who exhibit and distribute written and visual materials prior to judicial determination that the materials are obscene? (Appeal dismissed. Randolph v. California, 47 LW 3251).

Issue: Is First Amendment protection adequately insured under the Federal Rules of Civil Procedure when a 497-day delay between the seizure of film and judicial determination of obscenity is permitted because the defendant fails to invoke federal rules which would have expedited the determination? (Certiorari denied. Echols v. U.S., 47 LW 3427).

Issue: Is the seizure of all motion picture film in an adult bookstore in violation of the First Amendment when the seizure results from a search warrant issued solely upon the affidavit of a police officer who read and copied material in the bookstore and viewed and described one film? (Certiorari denied. Apelby v. California, 47 LW 3172).

Issues: Does it violate the First Amendment to permit a jury to find defendants guilty of showing an obscene film without determining that the defendants had knowledge of the film's contents? Is there a denial of First Amendment rights if a jury drawn from one county is used to determine statewide obscenity standards? (Certiorari denied. Mascolo v. Massachusetts, 47 LW 3172).

Issue: Does the government fail to meet its burden of proof by not showing that alleged obscene materials placed in the mails appeal to the prurient interests of homosexuals, and does the trial court err in not requiring such demonstration? (Certiorari denied. Sherwood v. U.S., 47 LW 3022).

Issue: Do the Supreme Court's holdings in Miller v. California, 413

U.S. 15 (1973) and Hamling v. U.S., 418 U.S. 87 (1974) that determinations of obscenity under local community standards may be made by jurors drawing on their own knowledge of the community from which they come render changes of venue in obscenity cases inconsistent with interests of justice? (Certiorari denied. Espinoza v. U.S., 47 LW 3428).

Issue: Does a state obscenity statute permitting conviction on a finding of "general awareness of the nature" of a publication without proof of knowledge or awareness of contents adequately assure due process and constitutional compliance? The defendant was charged with obscenity for delivering Penthouse Magazine to a retailer. (Appeal dismissed. Manchester News Co., Inc. v. New Hampshire, 47 LW 3232).

Issues: Does a state statute which defines scienter (knowledge) in a way which enables an obscenity conviction for constructive knowledge (impermissibly chill) dissemination of materials under the First Amendment? May a mass seizure without a warrant of allegedly obscene material be sustained under the "plain view" doctrine? (Appeal dismissed. Simpson v. Georgia, 47 LW 3053).

Issue: Does 19 U.S.C. sect. 1305 which prohibits the importation of obscene articles and provides for their seizure and forfeiture violate the First Amendment because people "who import allegedly obscene articles in their baggage while returning from abroad are permitted to litigate the question of obscenity at locations close to their homes while people who import the same articles by mail are required to travel great distances in order to litigate the question of obscenity?" (Judgment affirmed. Cherry v. U.S. Secretary of Treasure, 47 LW 3687).

Issues: Are First Amendment rights violated by a judge who refuses to instruct the jury on the relevant size of the community by which standards for tolerance and acceptance of the allegedly obscene are to be judged? Does the refusal to allow expert testimony regarding community standards violate defendant's rights? Is counsel for the defendant permitted to introduce comparable literary material available in the community? (Certiorari denied. (Croatan Books, Inc. v. Virginia, 47 LW 3639).

Issue: Does a district court commit error by refusing to instruct a jury to apply contemporary community standards in judging whether allegedly obscene materials depict sexual conduct in a patently offensive way? (Certiorari denied. Wedelstedt v. U.S., 47 LW 3686).

Pending

Municipalities

Ruling below: A municipal ordinance which required as a prerequisite to a permit for a charitable organization to solicit contributions that 75 percent of the money raised be used for the organizations charitable purposes is unconstitutional The ordinance was unsuccessfully applied to an environmental group which combined solicitation with information gathering and promotion of its objectives. Issue: Does the municipality have the right to prohibit charitable solicitation when the soliciting organization cannot show that at least 75 percent of its receipts are used for charitable purposes. (Village of Shaumberg v. Citizens for a Better Environment, 47 LW 3689).

Armed Forces

Issue: Does a Navy and Marine Corps regulation requiring military personnel assigned to foreign duty stations to obtain prior approval before circulating on the installation petitions to members of Congress violate federal law? (Secretary of the Navy v. Huff, 47 LW 3410).

Issue: Do Air Force regulations requiring military personnel to obtain approval before circulating petitions to Congress opposing standards for maximum hair length violate the First Amendment and 10 U.S.C. section 1034? Brown v. Glines, 47 LW 3605).

FREEDOM OF THE PRESS: AN ERODING LEGAL CONCEPT

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> . . . Freedom of religion; freedom of the press, and freedom of person under the protection of the habeas corpus; and trial by juries impartially selected. These principles form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation.

The words are those of Thomas Jefferson on March 4, 1801, in his first inaugural address, and his singling out of freedom of the press as an essential part of the democratic process is often cited as evidence of an intention by our forefathers to assign the press a special status.

Because of the groundwork laid by Jefferson and the other framers of the Constitution and the Bill of Rights, members of the institutional press have traditionally seen themselves as occupying some kind of special, legally protected place in American society. The press, with encouragement from legislative bodies and the judiciary, has down through the years assumed that because the First Amendment to the U.S. Constitution mentions the institution specifically, the press must have been endowed by our founding fathers with a special status among all forms of business endeavor and must enjoy a unique protection against interference by legislative bodies.[1]

That assumption is now being threatened. Recent decisions of the Supreme Court indicate that the special constitutional status of the press is being eroded. The First Amendment is in the process of being redefined in such a way that, in the words of the Court, "The press does not have a monopoly on either the First Amendment or the ability to enlighten."[2]

The major architect of this redefinition is Chief Justice Warren E. Burger, but it should be realized that in the past six years seven out of the nine justices of the Supreme Court have, at least in part, paid homage to the legal principle that the press *vis a vis* the general public enjoys no special rights under the First Amendment.[3]

The implications of this legal philosophy are serious ones indeed for members of the institutional press. Already the philosophy, although still in its formative legal stages, has been the underlying factor in numerous Supreme Court decisions that have gone against the press in recent years. Reporters can no longer claim any constitutional protection of confidential information because of this "non-press" view of the First Amendment. Likewise, reporters can no longer claim any kind of constitutionally-sanctioned access to governmental information except that enjoyed by the general public.

Since the tacit implementation of the philosophy by a majority of the Court, reporters have been denied any special access to state and federal prisoners. They have been told that the First Amendment does not protect them and their editors from search warrants and subsequent searches through their files and notes. More recently, reporters and editors have been informed that the First Amendment does not protect their minds and thoughts from intrusion by the courts, and they have been told that they have no special right to attend pre-trial proceedings. Each new case seems to reiterate the point: freedom of the press as a constitutional legal concept is in danger.

Emergence of the Redefinition

While perhaps the most forceful and thorough explanation of this "non-press" view of the First Amendment, at least as perceived by Chief Justice Burger, occurs in the 1978 case of First National Bank of Boston v. Bellotti,[4] discussed below, the origins of the view are at least as old as the case of Branzburg v. Hayes,[5] decided by the Court in 1972.

Chief Justice Burger concurred in the 5-4 majority opinion written by Justice Byron White and announced White's opinion. In the case the Court decided that the First Amendment does not relieve a newspaper of the obligation "that all citizens have"[6] to respond to a grand jury subpoena and answer questions relevant to a criminal investigation. The Court declared that the First Amendment does not afford the media any constitutional testimonial privilege to conceal facts or evidence relevant to a grand jury's investigation.

Citing numerous cases,[7] the Court noted that "valid laws serving substantial interests may be enforced against the press as against others, despite the possible burden that may be imposed,"[8] Foreshadowing a theme that was to emerge in a number of future cases, the Court said: "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally [emphasis added].[9]

The Court went on to say:

> Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an important tribunal.[10]

The Court added:

> The information function asserted by representatives of the organized press in the present case is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make desclosures before a grand jury.[11]

In Branzburg v. Hayes, the majority of the Court relegated the First Amendment status of the press to a position coextensive to the First Amendment status of the general public, and in so doing established a legal philosophy that has prevailed to the present day.

Continuation of the Non-Press View

That this philosophy of "no special status" for the press was going to continue was apparent after two cases decided in 1973. In the first, Pell v. Procunier,[12] three journalists and four California prison inmates brought suit in the District Court challenging the constitutionality of a regulation of the California Department of Corrections that "press and other media interviews with specific individual inmates will not be permitted."[13] On appeal, the Supreme Court reiterated the Branzburg philosophy that, "The First Amendment does not

guarantee the press a constitutional right of special access to information not available to the public generally [emphasis added]."[14] The Court went on to say, "Similarly, newsmen have no constitutional right of access to prisons or their inmates, beyond that afforded the general public."[15] Once again, the Court had equated the rights of the press with those of all other citizens, thereby diminishing the special status of the press.

In another case decided at approximately the same time, Saxbe v. Washington Post Co.,[16] the Court stated that the same reasoning held sway regarding personal interviews between federal prisoners and newsmen. At issue was a policy statement of the Federal Bureau of Prisons prohibiting personal interviews between newspersons and individually designated inmates of federal medium-and maximum-security prisons. Citing Pell v. Procunier, the Court said:

> That the Constitution imposes upon the government the affirmative duty to make available to journalists sources of information not available to members of the public generally . . . finds no support in the words of the Constitution or in any decision of this Court [emphasis added].[17]

The Majority Opinion

The most extensive and enlightening statements surrounding the elimination of the "freedom of the press" concept came in the 1978 case of First National Bank of Boston v. Bellotti.[18] A close scrutiny of this case reveals that the erosion of any distinction between freedom of the press and freedom of speech is well underway.

The appellants in First National Bank of Boston, a group of national banking associations and business corporations, wanted to spend money to publisize their views on a political issue. They opposed a referendum proposal to amend the Massachusetts Constitution to authorize the legislature to enact a graduated income tax.

A Massachusetts criminal statute prohibited specified business corporations from making contributions or expenditures to influence the vote on any question submitted to the voters, other than a question that would materially affect any of the property, business or assets of the corporation themselves. The corporations brought action challenging the constitutionality of the statute.

The Supreme Court held that the statute violated the First Amendment as made applicable to the states by the Fourteenth Amendment. Justice Powell delivered the opinion of the Court, joined by Chief Justice Burger and Justices Stewart, Blackmun and Stevens. Chief Justice Burger filed a concurring opinion, discussed below, while Justice White filed a dissenting opinion in which Justices Brennan and Marshall joined. Justice Rehnquist filed a separate dissenting opinion. Before discussing the majority opinion and Chief Justice Burger's concurring opinion, it should be noted that Justice White's dissent does not address the points raised by Chief Justice Burger--the elimination of any distinction between "freedom of the press" and "freedom of speech"--but instead argues that a state has the inherent right to restrict corporate political or ideological activity. The dissent of Justice Rehnquist centers around his belief in the limited scope of the Fourteenth Amendment. Thus, no member of the Court in First National Bank of Boston directly disagrees with the philosophy delineated by Chief Justice Burger.

The majority opinion articulated by Justice Powell takes the position that "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporations, association, union, or individual."[19] Once again the Court is taking the stand that First Amendment rights are coextensive among all segments of society, and, by implication, that the institutional press is just another of many segments. Lest there be a remote chance that the implication be lost, the

Court comes right out and says: "But the press does not have a monopoly on either the First Amendment or the ability to enlighten."[20]

Developing the theme that First Amendment protection belongs to the public in general, the Court comments on a number of recent cases in which First Amendment protection was granted to commercial advertising after over 20 years of denial of such protection by the Court.[21] The Court said:

> Nor do our recent commercial speech cases lend support to appellees' business interest theory. They illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.[22]

Within this framework of this First Amendment right of the public, then, the Court in First National Bank of Boston finds the Massachusetts criminal statute unconstitutional.

The Burger Viewpoint

Perhaps the most startling and, at least to members of the institutional press, most frightening aspect of First National Bank of Boston is the concurring opinion written by Chief Justice Burger. In his opinion, the Chief Justice makes his feelings about any special status for the press starkly clear. He notes initially, "I join the opinion and judgment of the Court but write separately to raise some questions likely to arise in this area in the future."[23] He goes on to explain: "The Court has not yet squarely resolved whether the Press Clause [in the First Amendment] confers upon the institutional press any freedom from government restraint not enjoyed by all others."[24]

Burger is making two very important points here. He is saying that it has not yet been directly decided whether there is any such thing as "freedom of the press" apart from the freedom of speech enjoyed by all citizens under the Constitution (even though, as this paper has pointed out, the Court seems to have already indirectly decided against any special concept of "freedom of the press"), and the Chief Justice is also saying that the Court stands ready to make such a direct decision when the opportunity presents itself.

Burger leaves little doubt where he will stand when the chance to decide the case comes. He says, ". . . the history of the [Press] Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege."[25]

The Chief Justice cites in support of his view First Amendment scholars Lange[26] and Levy[27] who maintain that most pre-First Amendment commentators who used the term "freedom of speech" used it synonomously with "freedom of the press." Burger notes that this does not necessarily mean that the Press Clause is redundant. He expresses the belief that the Speech Clause protects the expression of ideas and that the Press Clause protects the wide dissemination of such ideas.[28] However, it is his conclusion that, "Yet there is no fundamental distinction between expression and dissemination."[29]

Burger then maintains that it would be impossible to define accurately the contours of the institutional press, even if the Court were inclined to assign it some special First Amendment status. He says:

> . . . the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining approach to the scope of Press Clause protection.[30]

The Chief Justice goes on to note that "any author may quite accurately assert that he is contributing to the flow of information to the public."31

It is in the final paragraphs of his opinion that Chief Justice Burger sounds the death knell for any special status for the institutional press. He says:

> Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. The purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it . . . the liberty of the press is no greater and no less . . . than the liberty of every citizen of the Republic.
>
> In short, the First Amendment does not "belong" to any definable category of persons or entities. It belongs to all who exercise its freedoms [emphasis added].32

The Coextensive Theory in Action

While it is true as Chief Justice Burger has noted that the diminution of the authority of the Press Clause has not yet been officially sanctioned by the Supreme Court, recent press cases have indicated that the philosophy itself has been adopted by a majority of the Court.

In Zurcher v. Stanford Daily,33 the Court declared that neither the First nor the Fourteenth Amendment is violated by the issuance of a warrant to search for criminal evidence reasonably believed to be on the premises of a newspaper, even though the newspaper is not suspected of involvement in any underlying crime. Justice White wrote the majority opinion, joined by Chief Justice Burger and Justices Blackmun, Powell and Rehnquist.

The case grew out of a search by police officers of the Stanford Daily's photographic laboratories, filing cabinets, desks and wastepaper baskets. The police, acting pursuant to a search warrant, were seeking material evidence relevant to a crime about which the Stanford Daily had carried photographs and stories, the crime being an attack upon police officers by demonstrators. The Daily and various members of its staff brought suit against the police officers who conducted the search, the chief of police, the district attorney and one of his deputies, and the judge who had issued the warrant. The Daily claimed infringement of constitutional rights under the First, Fourth and Fourteenth Amendments to the Constitution.

In discussing the First Amendment claims in Zurcher, the Court said:

> Nor are we convinced . . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment [emphasis added].34

The Court went on to say, "Furthermore, a warrant may issue to search the premises of anyone, without any showing that the occupant is guilty of any offense whatever."35

In this language, the Court is again taking the stand that the institutional press enjoys no special dispensation under the First Amendment that might immunize it from laws that apply to others. In a concurring opinion, Justice Powell states emphatically:

> I agree with the Court that there is no constitutional basis for such a reading [that any search of an entity protected by the Press Clause of the First Amendment is unreasonable so long as a subpoena can serve as an adequate substitute].
>
> If the framers had believed that the press was entitled to a special procedure, not available to others, when government authorities required evidence in its possession, one would have expected the terms of the Fourth Amendment, to reflect that belief [emphasis added].[36]

Just a month later, in June, 1978, the Court extended its philosophy of de-emphasizing the Press Clause in Houchins v. KQED.[37]

Contemplating an action by a California broadcast company seeking access to the Alameda County jail facilities at Santa Rita, the Supreme Court decided that neither the First nor Fourteenth Amendment guarantees the news media any right of access to governmental information or sources of information beyond that available to the general public.

Chief Justice Burger delivered the opinion of the Court and said:

> The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take movie and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information under government control [emphasis added].[38]

Lest there be any mistake, Chief Justice Burger reiterated the point: ". . . the Court did not remotely imply a constitutional right guaranteeing anyone access to governmental information beyond that open to the public generally. [emphasis added].[39]

At one point in Houchins, Burger notes that even if the press enjoyed special access, there is no guarantee that it would use the information gathered to further justice. He says:

> Unarticulated but implicit in the assertion that media access to the jail is essential for informed public debate on jail conditions is the assumption that media personnel are the best qualified persons for the task of discovering malfeasance in public institutions. But that assumption finds no support in the decisions of this Court or the First Amendment. Editors and newsmen who inspect a jail may decide to publish or not to publish what information they acquire [Citations omitted]. Public bodies and public officers, on the other hand, may be coerced by public opinion to disclose what they might prefer to conceal. No comparable pressures are available to compel publication by the media of what they might prefer not to make known [emphasis added].[40]

Two additional recent cases indicate that the diminution of the Press Clause and the removal of a special First Amendment status for the press will continue under the present Court. In Herbert v. Lando (1979)[41] the Court considered whether the First Amendment protected against inquiry into the state of mind of those who edit, produce, or publish, and into the editorial process. In holding that no such protection existed, Justice White, joined by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist and Stevens, said:

> Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages. The rules are applicable to the press and to other defendants alike, and it is evident that the courts across the country have long been accepting evidence going to the editorial processes of the media without encountering constitutional objections [emphasis added].[42]

Similarly, in Gannett v. DePasquale,[43] decided in July of 1979, the Court declared that members of the press and the public have no special right of access to pretrial hearings, since the Sixth Amendment's public trial guarantee is for the benefit of the defendant alone. Justice Stewart delivered the opinion of the Court, in which Chief Justice Burger and Justices Powell, Rehnquist and Stevens joined. The Court refused to address directly the question of whether the press and the public share a right of access to pretrial hearings under the First Amendment (the case was decided on Sixth Amendment grounds), saying, "We need not decide in the abstract, however, whether there is any such [First Amendment] consitutional right."[44]

It is, however, interesting to note that the press is not given special status in the case, and that the rights addressed by the Court are those of the "public" and the defendant. Indeed, the holding of Gannett v. DePasquale reads: "For these reasons, we hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials [emphasis added]."[45]

Conclusions

The present Supreme Court, under the direction of Chief Justice Warren Burger, has tacitly developed and implemented a judicial philosophy which downgrades any special status of the institutional press under the Press Clause of the First Amendment and which makes the First Amendment rights of the press coextensive with the First Amendment rights of the general public. Chief Justice Burger has served notice that at the first opportunity he has to do so, he will remove the tacit dimension of the philosophy and upgrade it to the law of the land under the doctrine of stare decisis.

Already the implementation of the philosophy in its tacit form has resulted in the denial by the Court of any special First Amendment rights of the press in the areas of confidential sources and confidential information, access to governmental information, access to state and federal prisoners, freedom from search warrants and subsequent searches, access to jail facilities, states of mind of reporters and editors, and access to judicial proceedings.

It seems safe to speculate that until the composition of the Supreme Court changes, this philosophy will continue to prevail, whether in tacit or overt form. It also seems safe to speculate, based on the evidence available so far, that the making of "freedom of the press" coextensive with "freedom of speech" will not so much elevate the status of freedom of speech as it will diminish the status of freedom of the press.

Endnotes

[1]For commentaries on freedom of the press vis a vis freedom of expression, see A Free and Responsible Press by the Commission on Freedom of the Press (University of Chicago Press, 1947); Sir William Blackstone, Commentaries on the Laws of England, edited by William Carey Jones, IV (San Francisco, 1916), 151; and Harold W. Chase and Craig R. Ducat, The Constitution and What It Means Today (Princeton University Press, 1974), 290.

[2]First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), 782.

[3]Chief Justice Burger in all cases noted in this paper; Justice Powell in First National Bank of Boston v. Bellotti (1978), Branzburg v. Hayes (1972), Zurcher v. Stanford Daily (1978), Herbert v. Lando (1979) and Gannett v. DePasquale (1979); Justice Stewart in First National, Pell v. Procunier (1973), Saxbe v. Washington Post Co. (1973), and Houchins v. KQED (1978), Justice Blackmun in First National, Branzburg, Pell, Saxbe, Zurcher, Herbert and DePasquale; Justice Stevens in First National, Saxbe, Herbert and DePasquale; Justice White in Branzburg, Pell, Saxbe, Zurcher, Houchins, and Herbert; and Justice Rehnquist in Branzburg, Pell, Saxbe, Zurcher, Houchins, Herbert and DePasquale.

[4]435 U.S. 765 (1978), 782.

[5]408 U.S. 665 (1972)

[6]Ibid.

[7]e.g., AP v. NLRB, 301 U.S. 103 (1937); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); AP v. U.S., 326 U.S. 1 (1945); Citizen Pub. Co. v. U.S., 394 U.S. 131 (1969); Grosjean v. American Press, 297 U.S. 233 (1936); and N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[8]408 U.S. 665 (1972), 682-683.

[9]Ibid., 684

[10]Ibid., 684-685.

[11]Ibid.

[12]417 U.S. 817 (1973).

[13]Ibid.

[14]Ibid., 818.

[15]Ibid., 834.

[16]417 U.S. 843 (1973).

[17]Ibid.

[18]435 U.S. 765 (1978).

[19]Ibid., 777.

[20]Ibid., 782

[21]Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

[22]435 U.S. 765 (1978), 783.

[23]Ibid., 795.

[24]Ibid.

[25]Ibid., 796.

[26]"The Speech and Press Clauses," 23 UCLA L. Rev. 77 (1975), 88-89.

[27]Legacy of Suppression: Freedom of Speech and Press in Early American History, 1960.

[28]435 U.S. 765 (1978), 800.

[29]Ibid.

[30]Ibid., 801.

[31]Ibid.

[32]Ibid., 802.

[33]3 Med. L. Rptr. 2377 (1978).

[34]Ibid., 2384.

[35]Ibid., 2385.

[36]Ibid., 2386.

[37]3 Med. L. Rptr. 2521 (1978).

[38]Ibid., 2523.

[39]Ibid.

[40]Ibid., 2525-2526.

[41]4 Med. L. Rptr. 2575 (1979).

[42]Ibid., 2580.

[43]5 Med. L. Rptr. 1337 (1979).

[44]Ibid., 1347.

[45]Ibid.

DEMOSTHENES' VIABLE DEFENSE OF FREE SPEECH IN CIVIL SERVICE

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The ancient city-state of Athens sustained a more radically democratic system of civil service than any current society but eventually required a powerful defense of the principles underlying freedom of speech. Every Athenian citizen held membership and the right to speak publicly in the Assembly (demos), though laws were enacted by the fourth century B.C. to regulate the speakers' focus, length, and decorum. Following the devastating political and military reversals of the late fourth century B.C., however, Athenians prosecuted leading orators and other civil servants for their free expression of formerly popular political beliefs. The renowned Demosthenes, a fugitive from justice by 323 B.C., eventually wrote a compelling defense of free speech in political epistles to the Athenian Assembly from his self-exile.

This essay recounts Demosthenes' commentary on citizens' freedom to speak and assemble as an historical complement to current concerns for First Amendment rights in American society. The essay explains the epistolary rather than oratorical sources for Demosthenes' expression of principles after chronicling the socio-political background of the most authentic letters.[1] The essay then analyzes Demosthenes' successive treatment of: the functions of free speech in democracies (Epistle "Concerning the Sons of Lycurgus"); and the advantages of free speech (Epistles "Concerning the Slanders of Theramenes" and "On Concord"). The conclusion addresses the significance of Demosthenes' letters for contemporary advocates of expanded First Amendment rights for civil servants.

Background and Source Criticism

Demosthenes attempted to influence deliberations of the Athenian Assembly as early as 354 B.C. when his oration On the Symmories argued that Athens was poorly prepared for warfare. Demosthenes' later orations, especially the three Olynthiacs and the four Philippics, spelled out a growing concern over the imperialism of Philip of Macedon. Demosthenes was instrumental in organizing Athenian resistance to Philip and his son, Alexander the Great. Although Demosthenes' guidance failed to rescue Athens from repeated political and military failures he enjoyed preeminence in the years following his celebrated debate On the Crown with Aeschines (330 B.C.). Demosthenes' conviction on charges of bribery and graft in 323 B.C. temporarily halted his prominent political career. Re-admitted to Athens after a brief exile, Demosthenes once again fled from the city after his participation in the unsuccessful Lamian War against Macedonia. Demosthenes committed suicide in 322 B.C. while being pursued by Macedonian agents.

Demosthenes' four letters to Athens collectively advocate the Assembly's reappraisal of his fall from political favor in 323 B.C., but the letters individually advocate the continuing need for free speech in the Athenian civil service. Demosthenes' formal political letters (demegoriae) technically provide the suitable vehicles for his expression of principles favoring free speech.[2] Such letters were categorically designed to introduce projected questions of public expedience--for example, Demosthenes wrote that the Athenian decision to punish a former statesman's sons for the "sins" of their father would be "neither right nor expedient" (3. 10).[3] Any personal misgivings of the orator over past political affairs were technically and substantively secondary in demegoric rhetoric because forensic speechmaking was the proper domain for personal apologetics.[4] Demosthenes stressed the future, public expedience of

free speech for Athenian democracy as his prime concern in writing to the Assembly. Although Demosthenes' Attic oratory may provide critics with longer, more ornately embellished arguements on civic affairs, Demosthenes' epistles provide the most concise and latest evidence of his stance on free speech.[5]

The Functions of Free Speech

Demosthenes' letter "Concerning the Sons of Lycurgus" was his second attempt to petition the Athenian Assembly for clemency.[6] Demosthenes had been convicted of accepting a bribe of twenty talents (roughly twenty times as heavy a load of coinage as one man could carry) from Harpalus to aid him in escaping from Athens late in 324 B.C.: Harpalus, imperial treasurer for Alexander the Great, had been detained and some of the money he had allegedly embezzled from Alexander's treasury at Babylon had been impounded by the Athenians. Although Harpalus was murdered in Crete soon after his escape, and Demosthenes had no direct responsibility for the security arrangements, Athens prosecuted Demosthenes for his complicity in the Harpalus affair. Demosthenes' political prominence represented a central issue in the case because Athens prosecuted him partially as an appeasement to Alexander the Great. An appellate court ultimately fined Demosthenes more than twice the sum of the bribe which he had accepted and sent him to prison (other prominent figures at Athens who were convicted of similar complicity received equally severe sentences). Demosthenes escaped to a self-imposed exile in the Peloponnesian peninsula of Greece to await more favorable times and treatment. His letter regarding the Athenian mistreatment of another civil servant's sons followed Demosthenes' first epistle from exile, now lost, which addressed the personal concessions which Demosthenes thought he should receive from the Assembly.

Demosthenes prefaced his explanation of the functions of free speech by referring to the example of Lycurgus' public service. Demosthenes generally portrayed the "many and obvious dangers which ore who chose to speak in the interests of the People had to face" (3. 3). Lycurgus was one Athenian civil servant who, in the face of many and obvious dangers, meritoriously "performed his duty in word and deed" (3. 4). Lycurgus' effective use of the public forum was especially meritorious because he exemplified personal accountability in government--he only spoke in favor of a policy which "he believed was to the interest of the People." (3. 4). Employing Lycurgus' example, Demosthenes outlined an ideal union of public liberality and personal restraint, a union of wisdom and eloquence, which would foster responsibility in free speech.

The main portion of Demosthenes' letter highlighted three functions of free speech in democratic societies. First, Demosthenes explained that freedom of speech promoted an informed and upright citizenry. Demosthenes shared the classical opinion that thorough education substantially caused personal virtue, and he illustrated that belief by contrasting the Athenians with Philip of Macedon, who was relatively uninformed (3. 11) ("especially by the rebukes of free-speaking equals").[7] On the other hand, Athenian citizens lived in a climate of "free speech, which is supposed to be able to render even obtuse people endurable" (3. 13). Citizens of democratic states could not apply their cultural reserves of conventional wisdom to improving their society without a free exchange of both critical and constructive opinions. Second, Demosthenes explained that the preservation of free speech as a civil right promoted equal, active participation by citizens in the life of the state. The revocation of one's right to free speech did comprise a traditionally legal sanction but even imprisoned Athenians historically retained access to the public forum. Curiously enough the prosecutor of Lycurgus' sons, Moerocles, himself enjoyed freedom of speech while he was imprisoned (3. 16-17). Far from causing a deterioration in the quality of civic life, wide public enjoyment of civil rights such as freedom of speech actually enhanced political and legal processes in society. Third, Demosthenes explained that public sustenance of free speech honored the society's reputation and encouraged a

ready supply of future public servants. The citizen who freely and responsibly speaks his mind "cannot please everyone" (3. 27); however, "everyone shares in the disgrace . . . when malice is seen to have more influence among you than gratitude for public services" (3. 28). More than merely a blow to national honor, such a censorious climate predictably hastens the time "when you will be bereft of men who will be spokesmen for your interests" (3. 31). Demosthenes recognized the technical requirements of the demegoric medium he had chosen and stressed future expediency in his remarks. He prophesied a decline in Athenian democracy if able young citizens abandoned their personal desires and skills for civil service. Further repression of liberal opportunities for free speech in the Assembly and elsewhere in Athens would most certainly discourage potential leaders from pursuing public careers.

Demosthenes summarized his view of the functions which freedom of speech performs in society while identifying his "first and most important consideration" in writing to the Assembly: free speech was both an "honor and advantage" for the society (3. 35). Demosthenes specified the "advantage" he saw in liberal attitudes toward public discourse in two other epistles discussed later in this essay. Demosthenes' twin emphasis on "honor" is especially noteworthy and merits immediate discussion. To the fourth-century B.C. orator, societal reputation deserved as much attention as practical politics; the right of free speech brought honor to societies and partially compensated for flaws in other areas of their political legacy. Demosthenes' plea for personal immunity in the remaining sections of his letter should not obscure the civic ideal which he also advocated.

The Disadvantages of Censorship

Demosthenes' letter "On Restoration" chastens the Athenian Assembly for ignoring freely disclosed accomplishments of a public servant while favoring negative, obscurely articulated judicial decisions. The court to which Demosthenes had appealed his case, the Council of the Areopagus, had indicted him and a jury of 1500 citizens had convicted him without disclosing the evidence.[8] Demosthenes fled into exile (April-May, 323 B.C.) partially as a result of the political complications surrounding his extortion of a large sum of "earnest" money from Harpalus for deposit in the Athenian treasury. Barely one month after Demosthenes' exile, however, at the death of Alexander the Great, the Athenians used Harpalus' money as the war chest for their revolt against Macedonia. Although the epistle "On Restoration" largely communicates Demosthenes' indignation at his mistreatment, the letter also includes the orator's indictment of ill-conceived censorship in the democratic process.

Demosthenes began his letter by identifying the acts of censorship which he perceived and by contrasting their effects with the "honor and advantage" he had discussed in his previous epistle. The Council of the Areopagus had indicted Demosthenes "in secret . . . without any evident demonstration and without any proof" (2. 1). Demosthenes perceived high tragedy in the Council's voluntary surrender of a principle which should have been embraced zealously, "something no less important" than the body of other rights denied to Demosthenes in his exile (2. 1). Linking his plea for restoration to his earlier defense of Lycurgus' sons, Demosthenes contrasted the censorious actions of the Council with the "universal admiration" for Athens and the "rewards" for a public servant associated with freedom of speech (2. 5).

Demosthenes developed his central argument by specifying the dishonor and disadvantage inherent to a policy of censoring the speech of civil servants. A policy of censorship weakens the "loyalty" which represents both a motive and a self-fulfilling reward for civil service; a censorious climate corrupts civil servants who otherwise would not expect personal rewards, "not favor, not splendid prospects, not wealth, not power, not security" (2. 5). The state will never lack applicants for civil offices who "will stoop . . . to every

form of subservience"; rather, civil service needs the relatively rare applicant who "out of loyalty" will speak out against "errors of judgment" in government (2. 11). Demosthenes specified stifled loyalty and a lack of public-mindedness as the major drawbacks of systems which severely restrict free speech, and he portrayed Athens (especially without his own restoration) in just such a disadvantageous position.

Demosthenes concluded his letter with a striking charge to the Assembly. The Athenians had engaged in a legal subterfuge "unworthy" of their heritage and much to their personal "discredit" (2. 21). Unlike the Assembly's approval of a secretive judicial process and a temporarily expedient censorship, more responsible civic leaders such as Demosthenes himself consistently work "to keep from betraying the truth" (2. 22). Demosthenes' charge, though clearly applied to his particular case, ideally stipulates the general disadvantages of censorship within civil service.

The Advantages of Free Speech

Demosthenes came under attack by inveterate political enemies while he sought refuge from Athenian sanctions during the Spring of 323 B.C. Publicly interpreting Demosthenes' self-imposed exile as his admission of guilt in the Harpalus affair, enemies such as Theramenes further castigated Demosthenes as having jinxed Athenian affairs of state for some time. In his letter "Concerning the Slanders of Theramenes," which does not enjoy substantial evidence for its authenticity, Demosthenes asserted his perennial worth to the Assembly. Contrary to the "insolent, shameless, absolutely brainless" charges levelled at him by Theramenes (4. 4), Demosthenes claimed that his frank advice to the state while a public servant proved to be "most fortunate" (4. 3). Demosthenes' subsequent letter to the Assembly at the time of Alexander's death provides more substantial commentary on the general advantages of free speech.

Athens most probably had initiated plans for a revolt against the Macedonian empire before Alexander the Great died at Babylon in June, 323 B.C., but news of his death spurred Athenian military preparations. Athens dispatched ambassadors throughout the Greek world to secure allies and military aid for the revolution; some of those envoys travelled to the Peloponnesian peninsula southwest of Athens, the area chosen as a refuge by Demosthenes. Demosthenes thoroughly impressed the envoys and the Athenian Assembly with is voluntary public orations supporting revolution during the Summer of 323 B.C. Athens restored Demosthenes to full citizenship later in the year. His letter "On Concord," besides aiding Demosthenes to gain amnesty, summarized how the exercise of free speech in civil service benefits the state during particularly troubled times.

Demosthenes perceived free speech as facilitating the attainment of political ideals, especially civil accountability and comprehensive public discussion and decision-making. For example, the death of Alexander the Great offered Athenians a chance to "win glory, security, and liberty" through open revolt; successful attainment of such ideals depended on the Assembly's ability to recognize "the necessary measures" to be taken without being misled by poor advice (1. 2). On the one hand, a climate of free speech enables rhetors to sense the Assembly's mood and "set right any misunderstandings" about courses of action (1. 3).[9] On the other hand, the open airing of opinions provides a comprehensive set of "starting points" for discussion and makes it "easy for the People to make the best decisions" (1. 4). Demosthenes' assertion that public tolerance of anything less than free speech in the Assembly was "ignoble" underscored the orator's reverence for Athenian political traditions (1. 5). Demosthenes also stressed the immediate and "greatest danger" in failing to seize the advantage offered by the disruption in Macedonian leadership (1. 5).

Demosthenes' figurative summary of his letter "On Concord" and, historically, of his epistles in their entirety blends realistic caution into an

otherwise confident prediction of Athenian success. Freedom of speech improves the guidance of the ship of state, but does not guarantee safe passage:

> You must think that just as on a ship for getting through safely some may recommend the sail and others the oars, so everything said on both sides has had the aim of deliverance, but its utility has been determined by the course of events as willed by the gods. [1. 8]

Demosthenes consistently stressed ideal values in his defense of free speech but, as the Greek revolutionaries' defeat at Crannon in 322 B.C. aptly demonstrated, the power of Fortune could not be denied in civil affairs. Demosthenes personally exhorted Athens to cling to political ideals while deliberating on immediately practical concerns. Demosthenes died for his civil service to Athens in support of the revolution, and his letters contain the orator's last surviving statements of principles explaining his code of civil conduct:

The Viability of Demosthenes' Arguments

Demosthenes might be compared to the career civil servant who, aggrieved by unusually administered sanctions for his public conduct, petitions for a commutation of sentence based on appeals to some of the most profound principles underlying the political system. Much as any erudite defendant might do, Demosthenes delivered a wide-ranging commentary on civil philosophy while pursuing personal remedies for a comparatively trivial plight. Plutarch recounts the depth of the exiled Demosthenes' outrage over the Athenian punishment of free speech in civil service:

> [W]hen young men came to visit and converse with him, he would try to deter them from public life, saying that if two roads had been presented to him in the beginning, one leading to the bema [a speaker's platform] and the assembly and the other straight to destruction, and if he could have known beforehand the evils attendant on a public career, namely, fears, hatreds, calumnies and contentions, he would have taken that road which lead directly to death.[10]

Demosthenes identified both societal honor and political advantage in the civil exercise of free speech. Death was preferable to life in a society dishonored by its censorship of human discourse; the society itself would eventually wither and die if it consistently ignored the vital advantage in training leaders through frank public discourse. Always the orator, Demosthenes may well have tactically overstated his case in rhetorically choosing death over life in a censored state. However, Demosthenes' twin citations of intangible, societal honor and practical, political advantage distinguished his defense of free speech as timelessly magnanimous as well as aptly realistic.

Advocates of expanded First Amendment rights for Americans engaged in civil service might find the theme of national "honor" a more defensible premise currently than in previous years. Popular disagreement with national goals and policies during the 1960's and 1970"s may have changed into a concensus on defending the status quo. During the 1980's, Demosthenes' citation of an intangible but honorable value in a national policy of free speech offers an attractive line of argument for expanded public discourse by civil servants. Advocates of wider First Amendment rights might also find the practical "advantage" of leadership training cited by Demosthenes as quite persuasive in current public discussion and debate. Even a cursory review of popular serials and periodicals reveals growing concern over American leadership for the 1980's at all levels: "The problem of leadership in the U.S. goes far beyond the Oval Office stultifying progress at every level of American society."[11] Relatively unrestricted opportunities for self-expression in local, state, and federal bureaucracies would allow civil servants to pursue executive

careers through the widest array of communicative channels.

Demosthenes' premises are not especially ingenious, nor were they novel in the fourth century B.C., but the citations of "honor" and "advantage" do represent historically substantive lines of argument. The historical continuity and argumentative substance of Demosthenes' remarks sustain their current viability.

Endnotes

[1]Tenth-century manuscripts contain six letters attributed to Demosthenes. Modern source criticism (especially French and German scholarship) disagrees over the letters' authenticity, but recent scholarship favors the authenticity of the epistles "Concerning the Sons of Lycurgus," "On Restoration," "On Concord," and possibly "Concerning the Slanders of Theramenes."

[2]The critical use of classical orators' letters as special references for insight into the orators' rhetorical methods is also evaluated in James J. Fernandez, "The Public Letters of Cicero," Communication Quarterly, 26 (1978), 21.

[3]Demosthenes, "Concerning the Sons of Lycurgus," in The Letters of Demosthenes, trans. and ed. Jonathan A. Goldstein (New York: Columbia Univ. Press, 1968) (1959). All subsequent references in the text to the number and section of Demosthenes' letters will refer to Goldstein's edition.

[4]Further detailed discussion of the technical form may be found in Francis Xavier J. Exler, The Form of the Ancient Greek Letter: A Study in Greek Epistolography (Washington, D.C.: Catholic University of America, 1923).

[5]See the explanation of Demosthenes' epistles as "messages of public interest even when addressed to individuals" in Demosthenes, Funeral Speech, Erotic Essay, Exordia, and Letters, trans. Norman W. DeWitt and Norman J. DeWitt, Loeb Classical Library (Cambridge: Harvard Univ. Press, 1949), p. 196.

[6]The nature and chronology of events toward the end of Demosthenes' life, and especially during the Harpalus affair, remain partially obscure. Charles D. Adams, "The Harpalos Case," Transactions of the American Philological Association, 32 (1901), 121-53 offers a meticulous criticism of the sources useful in establishing a chronology of events.

[7]See Goldstein's commentary, p. 216, on the "view prevalent in Athens of the moral deficiency of a monarch when compared to a free citizen."

[8]Adams, pp. 149-50.

[9]Epigraphical evidence attests to the role of "rhetors" in Athens as political advisers; see Otto A. Dieter, "The Rhetor Stone," Quarterly Journal of Speech, 51 (1965), 426-32.

[10]Plutarch, Parallel Lives of Greeks and Romans, trans. Bernodotte Perrin, Loeb Classical Library (New York: G. P. Putnam's Sons, 1928), volume 7, p. 67.

[11]"A Cry for Leadership," Time, August 6, 1979, p. 24.

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Civil Liberties. 22 East 40th Street, New York, New York: The American Civil Liberties Union.

Communicator. 1735 DeSales Street, N.W., Washington, D.C. 20036: Radio-Television News Directors Association.

Editor & Publisher. 575 Lexington Avenue, New York, New York 10025: Editor & Publisher.

Free Speech. 5205 Leesburg Pike, Falls Church, Virginia 22041: Speech Communication Association.

FOI Digest. P. O. Box 858, Columbia, Missouri 65201: Freedom of Information Center.

Media Law Notes. 431 Murphy Hall, University of Minnesota 55455: Law Division, Association for Education in Journalism.

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Court Cases

Ambach v. Norwick, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979). New York statute restricting certification of aliens as public school teachers was held not violate of equal protection clause nor First Amendment. 5-4 decision, with Blackmun, Brennan, Marshall and Stevens dissenting.

Babbitt v. Farm Workers, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). While the First Amendment guarantees workers the right individually or collectively to voice their views to their employers, it does not afford such employees the right to compel employers to engage in dialogue or even to listen. Seven justices concurred, while Brennan and Marshall concurred in part and dissented in part.

Bell v. Wolfish, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Federal custodial facility's practices of "double-bunking" inmates, prohibition of receipt of hardcover books except upon direct mail from the publisher, body-cavity searches, and room searches, and limitations on receiving packages did not violate the pretrial detainees' constitutional rights. 5 justices concurred; Powell concurred in part and dissented in part; Marshall, Stevens and Brennan dissented.

Chrysler Corporation v. Brown, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979). A Corporation which submits required documents to a governmental agency does not have a private right to enjoin the agency from releasing the documents persuant to a legitimate Freedom of Information request. Unanimous decision.

Dalia v. U.S., 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979). Covert entry to install a court-ordered electronic surveillance device was held authorized by the Omnibus Crime Control and Safe Streets Act and did not violate the Fourth Amendment. Five justices concurred, while 2 dissented in part (Brennan and Stewart) and 2 dissented (Stevens and Marshall).

Delaware v. Prouse, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Police officer's random stop of auto and detention of driver for check of driver's license and vehicle's registration is violative of the Fourth Amendment as an unreasonable seizure. 8 to 1 decision, with Rehnquist dissenting.

FCC v. Midwest Video Corporation, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979). Federal Communication Commission's cable television access rules were held to exceed legislative authority under the Communications Act of 1934. 6 to 3 decision, with Stevens, Brennan and Marshall dissenting.

Friedman v. Rogers, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979). Texas statute prohibiting optometry practice under a trade name does not violate free speech. 7 to 2 decision on this issue, with Blackmun and Marshall dissenting.

Gannett Company v. DePasquale, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). The Constitution does not give members of the press and the public an affirmative right of access to a pretrial preceeding when all participants in the litigation have agreed that it should be closed to protect the fair trial right of the defendants. 5 justices concurred, while four (Blackmun, Brennan, White and Marshall) dissented on this issue.

Givhan v. Western Line Consolidated School District, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). A public employee does not forfeit her First Amendment protection against governmental abridgment of freedom of speech when she arranges to communicate privately with her employer rather than to express her views publicly. Unanimous decision.

Helsloski v. Meanor, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979). Neither certain legal proceedings nor the courts will provide refuge under the speech or debate clause for Congressman who was indicted for conspiracy to violate statute forbidding a public official from accepting a bribe. 7-1 with Brennan dissenting and Powell not participating.

Herbert v. Lando, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). When a party sues for injury caused by an alleged damaging falsehood the plaintiff is not barred, because of any absolute privilege for the editorial process under the First Amendment, from inquiring into the editorial process including a defendant's mental process. 7-2 decision on the specific "state of mind" issue. (Stewart and Marshall dissenting), but a 6-3 decision on the "predecisional communication among editors" issue (Brennan also dissenting).

Hutchinson v. Proxmire, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979). A U.S. Senator's press release and newsletters containing alleged defamation of a scientist who received funds for research from agencies and who was awarded Senator's prize for wasting money (Golden Fleece Award) was not protected under the Constitution's privileged speech or debate clause applicable to Members of Congress since such publications were not essential to the deliberation of the Senate, and the scientist was not

a "public figure" for purposes of proving malice. 8-0 decision on this central issue, but with Stewart dissenting in part on follow-up telephone calls and television interviews as being a part of the Congressional oversight function.

Lo-Ji Sales, Inc. v. New York, 99 S.Ct. 2319, 60 L.Ed.2d (1979). A search of a bookstore for obscene materials pursuant to an open-ended warrant was held unconstitutional. Unanimous decision.

Marchioro v. Chaney, 99 S.Ct. 2243, 60 L.Ed.2d (1979). Washington statute governing requirements for political parties' state committees was held not violative of party members' freedom of association rights in the context of party committee's action regarding internal party matter. 8-0 decision with Powell not participating.

National Labor Relations Board v. Catholic Bishop of Chicago, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979). Teachers in a church operated school were held not within the coverage of the National Labor Relations Act, and thus precluding NLRB jurisdiction over church-run schools to require their recognition of teachers' unions. 5-4 decision, with Brennan, White, Marshall and Blackmun dissenting.

New York Times Co. v. Jascalevich, 99 S.Ct. 598, 58 L.Ed.2d 670 (1978). After Justice White, as individual justice, denied an application by a newspaper for a stay of an order compelling disclosure of evidence, Justice Marshall, as individual justice, denied the application for a stay of the lower court's judgment demanding compliance and disclosure.

Smith v. Arkansas State Highway Employees, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979). A state commission's refusal to consider its employee's grievance when submitted by a union rather than the employee did not violate the First Amendment. 7-1 decision (Marshall dissenting; Powell did not participate).

Smith v. Daily Mail Publishing Co., 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979). The West Virginia law making it a crime for a newspaper to publish lawfully obtained and truthful information about a minor charged as a juvenile offender without written approval of a juvenile court was violative of the First Amendment. 7 justices affirmed, with justice Rehnquist expressing grounds for restraint of publication. Powell did not participate.

Wolston v. Reader's Digest Association, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979). The plaintiff, who pled guilty over 15 years previously nonappearance before a grand jury which was investigating espionage activity, was held not to be a "public figure" for purposes of his defamation suit over book identifying him as a Soviet agent indicted for espionage. 8-1 decision with Brennan dissenting.